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The Relationship
OF
LANDLORD AND TENANT.

FOURTH EDITION.

THE
RELATIONSHIP
OF
LANDLORD AND TENANT.

BY
EDGAR FOA,
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

FOURTH EDITION.

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PREFACE

TO THE FOURTH EDITION.

IN the present Edition the main features of the work have been preserved unaltered. It has nevertheless again increased in size. It seems, in the nature of things, impossible to prevent this from happening, at all events in the earlier stages of a book's life.

In the first place, new cases and statutes—and the work in this respect has been brought down to the Long Vacation of the present year—have to be dealt with. Recent decisions on the scope of the covenant for quiet enjoyment (to give, as regards case law, but a single illustration) have had for their necessary result to enlarge to a certain extent the consideration of that topic; whilst, as regards statutes, the new Agricultural Holdings Act (which does not, however, take effect until after the end of next year) is naturally responsible for an important part of the expansion of the book.

But this is not the only cause of its growth. Special study applied to particular matters within the range of the subject almost always brings to light defects or omissions in their treatment. Points of view present themselves which have hitherto escaped notice, and deficiencies of this kind put forward claims to be remedied which it is not easy to resist. The discussion, for example, of the much-vexed covenant to

pay assessments has come in this way to be again entirely remodelled; and numerous other instances might easily be given.

The new Small Holdings and Allotments Act, which was passed too late to admit of incorporation with the text, has been inserted separately.

My friend, Mr. T. C. HINDMARSH, of Lincoln's Inn, has been kind enough to read through the whole of the proof-sheets of the present Edition, and has moreover continued to give to the book the benefit of his general assistance and supervision, for which I desire to record its deep obligations.

E. F.

1, ESSEX COURT, TEMPLE.
October, 1907.

PREFACE

TO THE FIRST EDITION.

THE present work is an attempt to treat the legal aspects of the relation of landlord and tenant in a connected form and systematic order.

With this view the following arrangement has been adopted:—The work is divided into two Parts, the former dealing with the creation of the relationship, and the latter with its determination. Each part comprises two Books, treating respectively of the *modes* and of the *incidents* of the creation of tenancies, and of the *modes* and of the *incidents* of their determination. Inasmuch, however, as many of the incidents—*i.e.*, the rights and duties—arising out of the creation of a tenancy naturally find place in the description of the modes in which it may come into existence, the second Book is devoted to the discussion of one incident common to all tenancies—that of Distress—which from its peculiar nature appears to require separate treatment. The above arrangement is not therefore put forward as a scientific classification, but as one based on considerations of convenience: the whole subject being in this manner presented in a symmetrical form, which it is hoped will tend to diminish its undoubted difficulty.

The cases are brought down to the present time. In order to save space, in the body of the work only one

reference as a rule is given—in the case of modern authorities the reference to the Law Reports where it exists. But in the table of cases prefixed to the work references to all the ordinary contemporaneous reports will be found upon all decisions ranging within the period (speaking roughly) of the last fifty years. Moreover, whenever a case, by reason of a change or modification of name, appears in any of these reports under such a form as to render its discovery in the table under the name by which it is cited in the text a matter of difficulty, both forms under which it appears will be found in the body of the work as well as in the list of cases. The date of the decision is given in all instances.

I have the pleasure to acknowledge my obligations for assistance in the preparation of the work throughout to my friends Messrs. T. C. HINDMARSH and E. STRODE, both of Lincoln's Inn; more particularly—from the former in the chapters on Notice to Quit and Ejectment (the substance of which has been contributed by him), and from the latter in those on Distress.

E. F.

1, ESSEX COURT, TEMPLE.
June, 1891.

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† “Ch. Div.” or “Q. B. Div.,” as distinguished from “Ch. D.” or “Q. B. D.,” signifies a decision of the Court of Appeal.

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SCHEDULES.

SMALL HOLDINGS AND ALLOTMENTS ACT, 1907.

[7 EDW. 7, CH. 54.]

An Act to amend the Law with respect to Small Holdings and Allotments.

[28th August, 1907.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I.

SMALL HOLDINGS.

Schemes as to the Provision of Small Holdings.

1.—(1) With a view to extending the provisions of small holdings, the Board of Agriculture and Fisheries (hereinafter referred to as "the Board") shall appoint two or more persons possessed of a knowledge of agriculture to be Small Holdings Commissioners (hereinafter referred to as the Commissioners), and may appoint such other officers for the purposes of this Act as the Board may, with the consent of the Treasury, determine.

(2) There shall be paid out of money provided by Parliament to the Commissioners and officers so appointed such salaries or remuneration as the Treasury may from time to time determine; and all expenses incurred by those Commissioners and officers in the execution of their duties under this Act, to such amount as may be sanctioned by the Treasury, shall (except as otherwise expressly provided by this Act) be defrayed out of money provided by Parliament.

2.—(1) The Commissioners, acting under the directions of the Board, shall ascertain the extent to which there is a demand for small holdings in the several counties or would be a demand if suitable land were available, and the extent to which it is reasonably practicable, having regard to the provisions of the Small Holdings Act, 1892, as amended by this Act, to satisfy any such demand, and for that purpose shall confer with the county councils and may co-operate with such other authorities, associations, and persons as they think best qualified to assist them, and take such other steps as they think necessary.

(2) The council of any county, borough, district, or parish may make representations to the Commissioners in respect of any such matters as aforesaid, and it shall be the duty of every council to furnish the Commissioners with such information, and to give them such other assistance, as they may reasonably require for the purposes of this section.

(3) The Commissioners shall report the information acquired by them respecting any county to the Board, and shall state whether it is desirable, in the opinion of the Commissioners, that such a scheme as is hereinafter mentioned should be made, and may indicate the nature of the proposals which the Commissioners consider ought to be embodied in the scheme.

(4) If in the course of their inquiries the Commissioners receive any

information as to the existence of a demand for allotments they shall communicate the information to the councils of the county, and of the borough, urban district, or parish concerned.

3.—(1) Where the Board, after considering the report and such representations as aforesaid as respects any county, are of opinion that it is desirable that a scheme should be made, the Board shall forward the report of the Commissioners with such modifications or observations (if any) as the Board think desirable to the county council, and it shall be the duty of the county council to prepare one or more draft schemes to give effect to the report with such modifications (if any) as aforesaid, or subject to such other modifications as the Board may make after considering any representations submitted to them by the county council, and in preparing the drafts the council shall have regard to the proposals (if any) of the Commissioners indicated in the report.

(2) If the county council decline to undertake this duty, or within six months after receiving the report or within such extended time as may be allowed by the Board, fail to prepare such one or more draft schemes as appear to the Board desirable, the Board may direct the Commissioners to prepare one or more draft schemes.

(3) A county council, if they think fit, may, without receiving any such report as aforesaid, prepare one or more draft schemes for the provision of small holdings for their county.

(4) A draft scheme under this section may specify—

- (a) the localities in which land is to be acquired for small holdings;
- (b) the approximate quantity of land to be acquired, and the number, nature, and size of the small holdings to be provided, in each locality;
- (c) whether, and to what extent, grazing or other similar rights, to be defined in the scheme, should be attached to the small holdings created in pursuance of the scheme, and, if so, the approximate quantity of land or extent and nature of the rights to be acquired for the purpose;
- (d) the time within which the scheme or any part thereof is to be carried into effect;

and the scheme may contain such incidental, consequential, or supplemental provisions (including provisions as to the subsequent variation of the scheme) as may appear necessary or proper for the purposes of the scheme.

(5) Where the Commissioners report or the county councils concerned are of opinion that a scheme should be made affecting two or more counties, the scheme may be prepared by the councils jointly, and may provide for joint action being taken by the councils.

4.—(1) A copy of any draft scheme under this Act shall, if prepared by a county council be sent to the Board, and if prepared by the Commissioners be sent to the Board and to any county council concerned, and the draft scheme and any modifications therein which the Board may propose to make shall be published and advertised together with notice of the time within and manner in which objections are to be sent to the Board in such manner as the Board think best adapted for informing the persons affected and for insuring publicity.

(2) The Board shall consider the draft scheme and any objections thereto duly made, and may in any case and shall, if the county council object to the scheme, or, in the case of a scheme prepared by the council, to any modifications therein which the Board propose to make, hold a public local inquiry, at which the county council, and such other persons as the person holding the inquiry may in his discretion think fit to allow, shall be permitted to appear and be heard.

(3) The Board, after considering the objections and the report of the person holding the inquiry (if any), may settle and confirm the scheme either without modification or subject to such modifications as the Board think fit, or may annul the scheme.

5.—(1) It shall be the duty of a county council on which obligations are imposed by a scheme to carry them into effect within such time as may be specified in the scheme, or within such further time as may be allowed by the Board, and for that purpose the council may exercise any of the powers conferred on them by the Small Holdings Act, 1892, or by this Act.

(2) If the county council fail so to fulfil their obligations, the Board shall by order direct the Commissioners to take such steps as may be necessary for carrying the scheme into effect, and upon such order being made the Commissioners shall for the purpose have all the powers of a county council in relation to small holdings under the Small Holdings Act, 1892, and this Act, and those Acts shall apply as if references to the Commissioners were substituted for references to a county council :

Provided that such expenses of the Commissioners as the Board certify to have been incurred by the Commissioners in the exercise of such powers in relation to any scheme and to be properly payable by the county council shall on demand be repaid to the Board by the county council in default out of the county fund, or, in the case of a county borough, out of the borough fund or borough rate, and shall be recoverable as a debt due to the Crown, and such sums as the Board certify to have been received by the Commissioners in respect of any land acquired shall be paid to the council.

(3) Any order made by the Board directing the Commissioners to carry a scheme into effect shall be laid before both Houses of Parliament as soon as may be after it is made.

(4) If it appears to the Board that the carrying out of a scheme under this Act has resulted or is likely to result in a loss, the Board may, with the consent of the Treasury, pay or undertake to pay out of the Small Holdings Account the whole or any part of that loss.

Amendments of the Small Holdings Act, 1892.

6.—(1) A county council may, for the purpose of providing small holdings for persons who desire to lease and will themselves cultivate the holdings, purchase land, whether situate within or without their county, by agreement, under and in accordance with the provisions of the Small Holdings Act, 1892, or take land on lease.

(2) If a county council are unable to acquire by agreement and on reasonable terms suitable land for the purpose aforesaid, they may acquire land compulsorily in accordance with the provisions of this Act relating to compulsory acquisition of land.

7. Land acquired by a county council for the purposes of small holdings may be adapted for letting and let for small holdings under and in accordance with the provisions of the Small Holdings Act, 1892, as amended by this Act, and those provisions shall apply accordingly.

8. It is hereby declared that for the purposes of subsection (2) of section eighteen of the Small Holdings Act, 1892, the expression "charge" means the net charge on the county rate calculated in accordance with regulations made by the Local Government Board after taking into account all receipts from or on account of small holdings or otherwise under the Small Holdings Act, 1892, or this Act.

9. In addition to the power under section four of the Small Holdings Act, 1892, of letting one or more small holdings to persons working on a co-operative system, a county council shall have power, with the consent of the Board, to let one or more holdings to any association formed for the purposes of creating or promoting the creation of small holdings, and so constituted that the division of profits amongst the members of the association is prohibited or restricted.

10.—(1) The power to make rules conferred on a county council by section seven of the Small Holdings Act, 1892, shall, subject to the provisions of that Act, extend to the making of rules prescribing the terms and conditions on or subject to which small holdings are to be sold or let by the county council.

(2) All rules made under the said section as so extended shall be subject to confirmation by the Board.

11. A county council may, if they think fit, relax the condition imposed by section nine of the Small Holdings Act, 1892, that not more than one dwelling-house shall be erected on a holding, if in their opinion such relaxation will be for the benefit of that or adjacent small holdings provided by the council, but so that the council shall not authorise more than one dwelling-house to be erected for occupation with any one small holding.

12.—(1) Where under subsection (2) or subsection (3) of section nine of the Small Holdings Act, 1892, the county council have power to cause or require a small holding to be sold, the council may, in the event of their requiring such holding for the purposes of the Small Holdings Act, 1892, or this Act, by notice in writing require the holding to be sold to themselves at such price as, in default of agreement, may be determined by arbitration, and thereupon the council shall, after such date as may be specified by the notice and on production to the registrar of the land registry of evidence of service of the notice and of the payment of the sum so agreed or determined or of the tender of such payment, be registered as the proprietor of the land in place of the registered proprietor, and such registration shall operate as a registration on a transfer for valuable consideration under the Land Transfer Acts, 1875 and 1897.

(2) A notice for the purposes of this section shall be deemed to be sufficiently served if sent by registered post addressed to the owner or the personal representatives of the deceased owner at his registered address or at his last known place of abode.

(3) This section shall only apply in the case where a small holding has been sold by the county council.

13. In section eleven of the Small Holdings Act, 1892 (which relates to the right of purchase if a small holding is diverted from agriculture), the words "and then to the person or persons whose lands immediately adjoin the holding" shall be repealed.

14.—(1) The maximum period which may be sanctioned as the period for which money may be borrowed by a county council under the Small Holdings Act, 1892, shall, where the purpose for which the money is borrowed is the purchase of land under that Act or this Act, be eighty years.

(2) Where a loan is made by the Public Works Loans Commissioners to a county council for the purposes of the Small Holdings Act, 1892, as amended by this Act—

- (a) The loan shall be made at the minimum rate allowed for the time being for loans out of the local loans fund; and
- (b) If the Local Government Board make a recommendation to that effect, the period for which the loan is made by the Public Works Loans Commissioners may exceed the period allowed under the Public Works Loans Act, 1875, and the Acts amending that Act, but the period shall not exceed the period recommended by the Local Government Board, nor, where the purpose of the loan is the purchase of land, eighty years, or in any other case fifty years; and
- (c) As between loans for different periods, the longer duration of the loan shall not be taken as a reason for fixing a higher rate of interest.

15. A county council may make arrangements with the council of any borough or urban district in the county for the exercise by the council of that borough or district as agents for the county council, on such terms and subject to such conditions as may be agreed on, of any powers of the county council in respect of the

acquisition, adaptation, and management of small holdings for the borough or district, and the council of the borough or district may, as part of the arrangement, undertake to pay the whole or any part of the loss (if any) incurred in connection with those small holdings, and any sum payable in pursuance of any such undertaking shall be defrayed as part of the general expenses of the council in the execution of the Public Health Acts.

Powers of Board of Agriculture and Fisheries.

16. The Board may, if after inquiry they think it advisable to do so with a view to demonstrating the feasibility of the establishment of small holdings in any locality, exercise the powers conferred on county councils by the Small Holdings Act, 1892, and this Act in relation to small holdings (except the powers of acquiring land compulsorily and of borrowing) and those Acts shall apply as if references to the Board were substituted for references to a county council; but the expenses of the Board shall be defrayed out of, and their receipts paid into, the small holdings account, and no part thereof shall be paid out of any rate.

17. The Board may, if they think fit, and subject to regulations made by the Board with the approval of the Treasury, repay or undertake to repay to a county council, out of the Small Holdings Account, the whole or any part of the expenses incurred by the council in proceedings in relation to the acquisition of land for the purposes of small holdings, and the amount so repaid shall not be treated as part of the costs incurred by the council in relation to land for the purposes of sections four and eighteen of the Small Holdings Act, 1892, but nothing in this section shall authorise the repayment of any part of any purchase money, compensation, or rent payable in respect of the land.

18. Where the Commissioners acting in default of a county council, or the Board for the purpose of demonstrating the feasibility of the establishment of small holdings, exercise the powers of a county council under the Small Holdings Act, 1892, or this Act, the Board may appoint such advisory and managing committees as they think fit, with such powers and duties as may be conferred or imposed on them, and may, with the consent of the Treasury, pay out of the Small Holdings Account all reasonable travelling and out-of-pocket expenses of the members of committees so appointed:

Provided that where the expenses are incurred for the purposes of the powers exercised by the Commissioners acting in default of a county council, those expenses shall be treated as expenses incurred by the Commissioners in the exercise of the powers of the county council.

19.—(1) For the purposes of this Act there shall be opened an account at the Bank of England, called "The Small Holdings Account."

(2) There shall be paid to this account—

(a) Such money as may from time to time be provided by Parliament towards defraying the costs and expenses of the Board directed by this Act to be paid out of the Small Holdings Account; and

(b) All sums received by the Board and directed by this Act to be paid into the Small Holdings Account.

(3) The costs and expenses of the Board directed by this Act to be paid out of the Small Holdings Account shall be paid by the Board out of the money standing to that account.

(4) At the end of every financial year, accounts of the receipts and expenditure of the Small Holdings Account shall be made up in such form and with such particulars as may be directed by the Treasury, and shall be audited by the Comptroller and Auditor-General as public accounts in accordance with such regulations as the Treasury may make, and shall be laid before Parliament, together with his report thereon.

(5) Payments out of, and into, the Small Holdings Account, and all other matters relating to the Account, and to the money standing to the credit of the Account, shall be paid and regulated in such manner as the Treasury direct.

PART II.

ALLOTMENTS.

20.—(1) The powers of the Local Government Board under the Allotments Acts, except such of those powers as relate to the finance of local authorities, shall be transferred to the Board of Agriculture and Fisheries, and, if any question arises as to whether any power is a power which has been transferred under this provision, the question shall be determined by the Local Government Board, whose decision shall be final.

(2) The powers and duties of rural district councils under the Allotments Acts shall be transferred to parish councils, and those Acts shall have effect as if references therein to the sanitary authority and the district thereof included references to the parish council and the parish, and subject to such other adaptations as may be necessary.

(3) All property acquired and all liabilities incurred by any rural district council under the Allotments Acts shall, as from an appointed day fixed by the Local Government Board either generally or as respects any particular district, by virtue of this Act be transferred to and vested in the parish council of the parish in respect of which the property was acquired or the liabilities incurred.

(4) Money borrowed by a parish council under section twelve of the Local Government Act, 1894, for the purposes of the powers and duties transferred to or conferred on the council under this Act shall not be reckoned as part of the debt of the parish for the purpose of the limitation on borrowing under the said section twelve.

(5) Sections two hundred and forty-two and two hundred and forty-three of the Public Health Act, 1875, relating to loans by the Public Works Loan Commissioners to a local authority, shall, with the necessary adaptations, apply to a loan to a parish council under the Local Government Act, 1894, or to a county council lending money to a parish council under that Act, where the purpose for which the loan is required by the parish council is the acquisition, improvement, or adaptation of land under the Allotments Acts as amended by this Act.

(6) Sections sixty-eight, seventy, seventy-two, eighty-five, eighty-six, eighty-seven, and eighty-eight of the Local Government Act, 1894 (which relate to adjustment of property and liabilities, determination of questions, local inquiries, current rates, accounts and proceedings, existing securities, and the discharge of existing debts, existing regulations, and pending contracts), shall apply as if they were herein re-enacted and in terms made applicable to this section.

21.—(1) Five acres shall be substituted for one acre in subsection (3) of section seven of the Allotments Act, 1887, as the limit of the extent of an allotment or allotments which may be held by one person :

Provided that—

(a) The duty of a council under the Allotments Acts, as amended by this Act, to provide allotments shall not include the duty of providing allotments exceeding one acre in extent; and

(b) any part of the land acquired by a council under the Allotments Acts or this Act which exceeds five acres may be adapted for letting and let as an allotment, if the county council are satisfied by the council that it is convenient and desirable that it should be so let and consent to such letting accordingly.

(2) The powers of improving and adapting land for allotments under the Allotments Acts shall include power to erect buildings and make adaptations of existing buildings, but so that not more than one dwelling-house shall be erected

for occupation with any one allotment. No dwelling-house shall be erected for occupation with any allotment of less than one acre.

(3) A council shall have the same power of letting one or more allotments to persons working on a co-operative system or to an association formed for the purposes of creating or promoting the creation of allotments as may be exercised as respects small holdings by a county council.

22. If a council are unable to acquire land by agreement and on reasonable terms under the Allotments Acts as amended by this Act, they may acquire land compulsorily in accordance with the provisions of this Act relating to compulsory acquisition of land.

23.—(1) The powers and duties as to the management of allotments transferred to a parish council by subsection (4) of section six of the Local Government Act, 1894, shall, in the case of a parish not having a parish council, be exercised and performed by persons appointed by the parish meeting.

(2) The provisions of the Allotments Acts, as amended by this Act, shall apply to an allotment of which the management is transferred to a parish council under subsection (4) of section six of the Local Government Act, 1894, in like manner as if it had been acquired by the council under the general powers of the first-mentioned Acts.

24.—(1) The following subsection shall be substituted for subsection (1) of section two of the Allotments Act, 1890:—

"It shall be the duty of a county council to ascertain the extent to which there is a demand for allotments in the several urban districts (other than boroughs) and rural parishes in the county or would be a demand if suitable land were available, and the extent to which it is reasonably practicable, having regard to the provisions of the principal Act as amended by any subsequent enactment, to satisfy any such demand, and for that purpose to co-operate with such authorities, associations, and persons as they think best qualified to assist them, and take such other steps as they think necessary."

(2) If the Board are, in relation to any urban district (other than a borough) or rural parish, satisfied, after holding a local inquiry at which the county council and the council of the district or parish, and such other persons as the person holding the inquiry may, in his discretion, think fit to allow, shall be permitted to appear and be heard, that the county council have failed to fulfil their obligations under the Allotments Act, 1890, as amended by this section, the Board may by order transfer to the Commissioners all or any of the powers of the county council under the Allotments Acts as amended by this Act in relation to the district or parish, and those Acts shall apply as if references to the Commissioners were substituted for references to the county council and with such other adaptations as may be made by the order.

25. The powers conferred on sanitary authorities by the Allotments Acts as amended by this Act may in London be exercised by the London County Council, and those Acts as so amended shall apply accordingly, except that, subject to the provisions of this Act, the expenses shall be defrayed and money borrowed under and in accordance with the provisions of the Local Government Act, 1888.

PART III.

GENERAL.

Acquisition of Land.

26.—(1) Where a council propose to purchase land compulsorily under this Act, the council may, subject to the provisions of Part I. of the First Schedule to this Act, submit to the Board an order putting in force as respects the land specified in the order the provisions of the Lands Clauses Acts with respect to the purchase and taking of land otherwise than by agreement.

(2) Where a council propose to hire land compulsorily, the council may submit to the Board an order for the compulsory hiring of the land specified in the order for a period not less than fourteen nor more than thirty-five years, and the provisions of Part I. of the First Schedule to this Act shall apply to the order in like manner as it applies to an order for compulsory purchase, with the substitution of "hiring" for "purchase," and with the modifications set out in Part II. of that Schedule.

(3) An order under this section shall be of no force unless and until it is confirmed by the Board, and the Board may, subject to the provisions of the First Schedule to this Act, confirm the order either without modification or subject to such modifications as they think fit, and an order when so confirmed shall become final and have effect as if enacted in this Act; and the confirmation by the Board shall be conclusive evidence that the requirements of this Act have been complied with, and that the order has been duly made and is within the powers of this Act.

(4) An order under this section may provide for the continuance of any existing easement or the creation of any new easement over the land authorised to be acquired, and every such order shall, if so required by the owner of the land to be acquired, provide for the creation of such new easements as are reasonably necessary to secure the continued use and enjoyment by such owner and his tenants of all means of access, drainage, water supply, and other similar conveniences theretofore used or enjoyed by them over the land to be acquired: Provided that, notwithstanding anything contained in this subsection, no new easement created by or in pursuance of such order over land hired by a council shall continue beyond the determination of such hiring.

(5) In determining the amount of any disputed compensation under any such order, no additional allowance shall be made on account of the purchase or hiring being compulsory.

(6) Where land authorised to be compulsorily hired by an order under this section is subject to a mortgage, any lease made in pursuance of the order by the mortgagor or mortgagee in possession shall have the like effect as if it were a lease authorised by section eighteen of the Conveyancing and Law of Property Act, 1881.

(7) Where the council proposing to acquire land compulsorily is a parish council, the council shall, instead of themselves making and submitting to the Board the order, represent the case to the county council, and thereupon the county council may, on behalf of the parish council, exercise the powers in relation to compulsory purchase or hiring conferred on councils by this Act, and the order shall be carried into effect by the county council, but the land shall be assured or demised to the parish council, and all expenses incurred by the county council shall be paid by the parish council:

Provided that if the parish council are aggrieved by the refusal of the county council to proceed under this section, the parish council may petition the Board, and thereupon the Board, after such inquiry as they think fit, may make such an order as the county council might have made, and this subsection shall apply as if the order had been made by the county council.

(8) If, after the determination of the amount of the compensation (including in the case of land hired compulsorily the rent) to be paid to any person in respect of his interest in the land proposed to be compulsorily acquired, it appears to the council that the land cannot be let for small holdings or allotments, as the case may be, at such a rent as will secure the council from loss, the council may at any time within six weeks after the determination of the amount by notice in writing withdraw any notice to treat served on that person or on any other person interested in the land, and in such case any person on whom such a notice of withdrawal has been served shall be entitled to obtain from the council compensation for any loss or expenses which he may have sustained or incurred by reason or in consequence of the notice to treat and of the notice of withdrawal, and the amount of such compensation shall, in default of agreement, be determined by arbitration:

Provided that in every case in which the notice of withdrawal is given by the

Commissioners acting in default of the council all compensation payable under this subsection shall be paid out of the Small Holdings Account.

27.—(1) Where a council has hired land compulsorily, for small holdings or allotments, the council may, by giving to the landlord not more than two years nor less than one year before the expiration of the tenancy notice in writing, renew the tenancy for such term, not being less than fourteen nor more than thirty-five years, as may be specified in the notice, and at such rent as, in default of agreement, may be determined by valuation by a valuer appointed by the Board, but otherwise on the same terms and conditions as the original lease, and so from time to time :

Provided that if on any such notice being given the landlord shall prove to the satisfaction of the Board that any land included in the tenancy is required for the amenity or convenience of any dwelling-house, then such land shall be excluded from the renewed tenancy.

(2) In assessing the rent to be paid under this section the valuer shall not take into account any increase in the value of the holding—

- (a) due to improvements in respect of which the council would have been entitled to compensation, if instead of renewing the tenancy the council had quitted the land on the determination of the tenancy, or
 - (b) due to any use to which the land might otherwise be put during the renewed term, being a use in respect of which the landlord is entitled to resume possession of the land under this Act, or
 - (c) due to the establishment by the council of other small holdings or allotments in the neighbourhood,
- or any depreciation in the value of the land in respect of which the landlord would have been entitled to compensation if the council had so quitted the land as aforesaid.

28.—(1) Any person having power to lease land for agricultural purposes for a limited term, whether subject to any consent or conditions or not, may, subject to the like consent and conditions (if any), lease land to a council for the purposes of small holdings or allotments for a term not exceeding thirty-five years, either with or without such right of renewal as is conferred by this Act in the case of land hired compulsorily for those purposes.

(2) The like powers of leasing may be exercised, in the case of land belonging to the Crown, by the Commissioners of Woods, with the consent of the Treasury, in the case of land forming part of the possessions of the Duchy of Lancaster, by the Chancellor and Council of the Duchy of Lancaster by deed under the seal of the Duchy in the name of His Majesty his heirs and successors, and, in the case of land forming part of the possessions of the Duchy of Cornwall, by the Duke of Cornwall or other the persons for the time being having power to dispose of land belonging to that Duchy.

(3) The like powers of leasing may be exercised in the case of glebe land or other land belonging to an ecclesiastical benefice by the incumbent thereof with the consent of the Ecclesiastical Commissioners alone upon such terms and conditions and in such manner as the Ecclesiastical Commissioners may approve.

29. In the case of glebe land or other land belonging to an ecclesiastical benefice hired by a council for the purposes of small holdings or allotments—

- (1) The provisions of the Ecclesiastical Dilapidations Act, 1871, shall not during the continuance of the tenancy be applicable to the buildings upon the land ;
- (2) At the determination of the tenancy, on the council quitting the land, or at any time within twelve months thereafter, the incumbent of the benefice to which the land belongs may apply to the Ecclesiastical Commissioners for their consent to the removal of any buildings which have been erected on the land for the purpose of adapting the land for small holdings or allotments, and, on proof to the satisfaction of the Commissioners that any such buildings are useless, and that it is to the

interest of the benefice that they should be removed, the incumbent may, with the consent of the Commissioners and subject to such directions as they may give, pull down any such buildings and dispose of the materials thereof, and any proceeds shall be paid to the Commissioners to be by them applied to the improvement of the benefice in such manner as the Commissioners may direct.

30.—(1) No land shall be authorised by an order under this Act to be acquired compulsorily which at the date of the order forms part of any park, garden, or pleasure ground, or forms part of the home farm attached to and usually occupied with a mansion house or is otherwise required for the amenity or convenience of any dwelling-house, or which is woodland not wholly surrounded by or adjacent to land acquired by a council under this Act, or which at that date is the property of any local authority or has been acquired by any corporation or company for the purposes of a railway, dock, canal, water, or other public undertaking, or is the site of an ancient monument or other object of archæological interest.

(2) The council in making, and the Board in confirming, an order for the compulsory acquisition of land shall have regard to the extent of land held or occupied in the locality by any owner or tenant and to the convenience of other property belonging to or occupied by the same owner or tenant, and shall, so far as practicable, avoid taking an undue or inconvenient quantity of land from any one owner or tenant, and for that purpose, where part only of a holding is taken, shall take into consideration the size and character of the existing agricultural buildings not proposed to be taken which were used in connection with the holding, and the quantity and nature of the land available for occupation therewith, and shall also, so far as practicable, avoid displacing any considerable number of agricultural labourers or others employed on or about the land.

(3) No holding of fifty acres or less in extent, nor any part of any such holding, shall be authorised by an order under this Act to be acquired compulsorily for the purposes of small holdings or allotments.

31.—(1) The powers of a council to acquire land for small holdings or allotments shall, subject to the restrictions by this Act imposed, include power to acquire land for the purpose of attaching to small holdings or allotments provided by the council rights of grazing and other similar rights over the land so acquired, and to acquire for that purpose stints and other alienable common rights of grazing.

(2) Any rights created or acquired by the council under this section shall be attached to the small holdings or allotments in such manner and subject to such regulations as the council think expedient.

(3) The powers conferred by this section shall be in addition to and not in substitution for the powers of providing common pasture conferred by section twelve of the Allotments Act, 1887.

32.—(1) A county council may sell or let to a borough, urban district, or parish council for the purpose of allotments any land acquired by them for small holdings, and a borough, urban district, or parish council may sell or let to the county council for the purpose of small holdings any land acquired by them for allotments, and the provisions of the Lands Clauses Acts with respect to the sale of superfluous land shall not apply on any such sale.

(2) Subsection (2) of section eleven of the Allotments Act, 1887, shall apply to the proceeds of sale under this section of land acquired for allotments.

33.—(1) Where land has been hired by a council compulsorily under this Act or the Allotments Acts, and the land or any part thereof at any time during the tenancy thereof by the council is shown to the satisfaction of the Board to be required by the landlord to be used for building, mining, or other industrial purposes, or for roads necessary therefor, it shall be lawful for the landlord to resume possession of the land or part thereof upon giving to the council twelve months' previous notice in writing of his intention so to do; and,

if a part only of the land is resumed, the rent payable by the council shall as from the date of resumption be reduced by such sum as in default of agreement may be determined by valuation by a valuer appointed by the Board.

(2) Where the land has been hired compulsorily by the Commissioners acting in default of a county council, any question as to the right of the landlord to resume possession of the land or any part thereof under this section shall be determined by an arbitrator appointed by the Lord Chief Justice of England.

34. Where a labourer who has been regularly employed on any land acquired by a county council for small holdings, proves to the satisfaction of the county council that the effect of the acquisition was to deprive him of his employment, and that there was no employment of an equally beneficial character available to him in the same locality, the county council may pay to him such compensation as they think just for his loss of employment or for his expenses in moving to another locality, and any sum so paid shall be treated as part of the expenses of the acquisition of the land.

35.—(1) Where a council has let a small holding or allotment to any tenant, the tenant shall as against the council have the same rights with respect to compensation for the improvements mentioned in paragraph (27) (i) (ii) (iii) and (iv) of the First Schedule to the Agricultural Holdings Act, 1900, as if it had been agreed in writing that the holding or allotment should be let as a market garden:

Provided that the tenant shall not be entitled to compensation in respect of any such improvement if executed contrary to an express prohibition in writing by the council affecting either the whole or any part of the holding or allotment; but, if the tenant feels aggrieved by any such prohibition, he may appeal to the Board, who may confirm, vary, or annul the prohibition, and the decision of the Board shall be final.

(2) Where land has been hired by a council for small holdings or allotments, the council shall (subject in the case of land hired by agreement to any agreement to the contrary) be entitled at the determination of the tenancy on quitting the land to compensation under the Agricultural Holdings (England) Acts, 1883 to 1906, for any improvement mentioned in paragraph (27) (i) (ii) (iii) and (iv) of the First Schedule to the Agricultural Holdings Act, 1900, and for any improvement mentioned in Part I. or Part II. of that schedule which was necessary or proper to adapt the land for small holdings or allotments, as if such improvements as aforesaid were improvements mentioned in Part III. of that schedule:

Provided that, in the case of land hired compulsorily, the amount of the compensation payable to the council for those improvements shall be such sum as fairly represents the increase (if any) in the value to the landlord and his successors in title of the holding due to those improvements.

(3) The tenant of an allotment to which the Allotments Acts as amended by this Act apply may, if he so elects, claim compensation for improvements under the Allotments and Cottage Gardens (Compensation for Crops) Act, 1887, instead of under the Agricultural Holdings (England) Acts, 1883 to 1906, as amended by this section, notwithstanding that the allotment exceeds two acres in extent.

(4) Subsection (5) of section seven of the Allotments Act, 1887, is hereby repealed.

Supplemental.

36.—(1) Every county council shall establish a small holdings and allotments committee, consisting either wholly or partly of members of the council, but the members of the council shall be a majority, and all matters relating to the exercise and performance by the council of their powers and duties under the Small Holdings Act, 1892, the Allotments Acts, and this Act (except the power

of raising a rate or borrowing money) shall stand referred to the small holdings and allotments committee, and references in the Allotments Acts to the standing committee shall be construed as references to the small holdings and allotments committee, and the council before exercising any such powers shall, unless in their opinion the matter is urgent, receive and consider the report of the small holdings and allotments committee with respect to the matter in question, and the council may also delegate to the small holdings and allotments committee, with or without restrictions or conditions, as they think fit, any of their powers under the said Acts except the power of raising a rate or borrowing money.

(2) The small holdings and allotments committee may delegate any of their powers to sub-committees, consisting either wholly or partly of members of the committee, and in appointing any sub-committee to which is (*sic*) committed the powers of management of small holdings shall have regard to the advisability of including amongst the members of the sub-committee members of the councils of the boroughs, urban districts, or parishes in which the holdings are situate, or for which they are provided, and other persons acquainted with the needs and circumstances of the area for which the sub-committee acts.

(3) Where any receipts or payments of money under this Act are entrusted by the county council to the small holdings and allotments committee, or any sub-committee thereof, the accounts of those receipts and payments shall be accounts of the county council, and made up and audited accordingly.

37. Separate accounts shall be kept of the receipts and expenditure of a council under the Small Holdings Act, 1892, as amended by this Act, and under the Allotments Acts as amended by this Act, and any such receipts shall, subject to the provisions of those Acts, be applicable to the purposes of those Acts respectively, but not for any other purpose except with the consent of the Local Government Board; and, for the purpose of the provisions relating to the audit of accounts, any persons appointed by an urban sanitary authority under the Allotments Acts, or by a parish meeting under this Act, to exercise and perform powers and duties as to the management of allotments shall be deemed to be officers of the sanitary authority or parish meeting, as the case may be.

38. Section forty-one of the Agricultural Holdings (England) Act, 1883, which relates to the resumption of the possession of land by landlords with a view to its use for certain purposes, shall have effect as if there were included amongst those purposes the provision of small holdings.

39.—(1) A county council may promote the formation or extension of, and may, subject to the provisions of this section, assist, societies on a co-operative basis, having for their object, or one of their objects, the provision or the profitable working of small holdings or allotments, whether in relation to the purchase of requisites, the sale of produce, credit banking or insurance or otherwise, and may employ as their agents for the purpose any such society as is mentioned in subsection (4) of this section.

(2) The county council, with the consent of, and subject to regulations made by, the Local Government Board, may for the purpose of assisting a society make grants or advances to the society, or guarantee advances made to the society, upon such terms and conditions as to rate of interest and repayment or otherwise, and on such security, as the council think fit, and the making of such grants or advances shall be a purpose for which a council may borrow under the Small Holdings Act, 1892.

(3) Where the Board themselves provide small holdings under the provisions of this Act, they may, with respect to any such society carrying on business or intending to carry on business in the neighbourhood of those small holdings, exercise the powers of a county council under this section, and the provisions of this section shall apply accordingly, except that references to the Treasury shall be substituted for references to the Local Government Board, and that the expenses and receipts of the Board under this section shall be paid out of and into the Small Holdings Account.

(4) The Board with the consent of the Treasury may out of the Small Holdings Account make grants, upon such terms as the Board may determine, to any society having as its object or one of its objects the promotion of co-operation in connection with the cultivation of small holdings or allotments.

40. Any land acquired by the Commissioners under this Act shall be vested in the Board, but the Board may at any time transfer the land to the council at whose expense the land was acquired, and shall so transfer the land on payment of all sums due from the council in connection therewith, and on proof to the satisfaction of the Board that the council are willing to exercise and perform their powers and duties in relation thereto.

41. Anything by this Act required or authorised to be done by or to the Commissioners may be done by or to any one such Commissioner, and any document purporting to be signed by a Commissioner shall be received in evidence without proof of the appointment or handwriting of the Commissioner.

42.—(1) The Board and the Small Holdings Commissioners and other officers of the Board shall have for the purpose of an inquiry in pursuance of this Act the same powers as the Local Government Board and their inspectors respectively have for the purpose of an inquiry under the Public Health Acts.

(2) Notices of the inquiries shall be given and published in accordance with such general or special directions as the Board may give.

43.—(1) All questions which under this Act are referred to arbitration shall, unless otherwise expressly provided by this Act, be determined by a single arbitrator in accordance with the Agricultural Holdings (England) Acts, 1883 to 1906.

(2) Where an order has been made and confirmed authorising the compulsory acquisition of land by the Commissioners acting in default of a county council, the arbitrator or valuer, as the case may be, shall be appointed by the Lord Chief Justice of England instead of by the Board.

(3) The remuneration of an arbitrator or valuer appointed under this Act shall be fixed by the Board.

44. The Board shall make an annual report to Parliament of their proceedings, and of the proceedings of the Commissioners, under this Act, and also of the proceedings of the several county, borough, district, and parish councils under the Small Holdings Act, 1892, the Allotments Acts, and this Act, and for that purpose every such council shall, before such date in every year as the Board may fix, send to the Board a report of their proceedings under the Small Holdings Act, 1892, the Allotments Acts, and this Act during the preceding year.

45. Nothing in this Act shall affect the rights and obligations under any tenancy created before the commencement of this Act under the Small Holdings Act, 1892, or the Allotments Acts.

46.—(1) For the purposes of the Small Holdings Act, 1892, and this Act the expression "small holding" means an agricultural holding which exceeds one acre and either does not exceed fifty acres, or, if exceeding fifty acres, is at the date of sale or letting of an annual value for the purposes of income tax not exceeding fifty pounds.

(2) For the purposes of this Act—

The expression "prescribed" means prescribed by regulations made by the Board :

The expression "Allotments Acts" means the Allotments Acts, 1887 and 1890, as amended by the Local Government Act, 1894 :

The expression "landlord," in relation to any land compulsorily hired by a council, means the person for the time being entitled to receive the rent of the land from the council.

(3) For the purposes of the Small Holdings Act, 1892, the Allotments Acts, and this Act, any expenses incurred by a council in the enfranchisement of any land acquired by them for small holdings or allotments, or in the purchase or redemption of land tax, or any quit rent, chief rent, tithe, or other rentcharge, or other perpetual annual sum issuing out of land so acquired, shall be deemed to have been incurred in the purchase of the land.

(4) In this Act references to a parish council shall, in the case of a rural parish not having a parish council, include references to the parish meeting: Provided that any property by this Act transferred to and vested in a parish council shall in such a case be transferred to and vested in the chairman of the parish meeting and the overseers of the parish.

(5) Any notice required by this Act to be served or given may be sent by registered post.

47.—(1) This Act may be cited as the Small Holdings and Allotments Act, 1907, and, so far as it relates to small holdings, shall be construed with the Small Holdings Act, 1892, and may be cited with that Act as the Small Holdings Acts, 1892 and 1907, and, so far as it relates to allotments, shall be construed with the Allotments Acts, and may be cited with those Acts as the Allotments Acts, 1887 to 1907.

(2) This Act shall come into operation on the first day of January one thousand nine hundred and eight.

(3) This Act shall not extend to Scotland or Ireland.

(4) The enactments mentioned in the Second Schedule to this Act are hereby repealed, except as to Scotland, to the extent specified in the third column of that schedule.

SCHEDULES.

FIRST SCHEDULE.

PART I.

PROVISIONS AS TO THE COMPULSORY ACQUISITION OF LAND BY A COUNCIL.

(1) The order shall be in the prescribed form, and shall contain such provisions as the Board may prescribe for the purpose of carrying the order into effect, and of protecting the council and the persons interested in the land, and shall incorporate, subject to the necessary adaptations, the Lands Clauses Acts and sections seventy-seven to eighty-five of the Railways Clauses Consolidation Act, 1845, but subject to this modification, that any question of disputed compensation shall be determined by a single arbitrator appointed by the Board, who shall be deemed to be an arbitrator within the meaning of the Lands Clauses Acts, and the provisions of those Acts with respect to arbitration shall, subject to the provisions of this schedule, apply accordingly.

(2) The order shall be published by the council in the prescribed manner, and such notice shall be given both in the locality in which the land is proposed to be acquired and to the owners, lessees, and occupiers of that land as may be prescribed.

(3) If within the prescribed period no objection to the order has been presented to the Board by a person interested in the land, or if every such objection has been withdrawn, the Board shall, without further inquiry, confirm the order, but if such an objection has been presented and has not been withdrawn the Board shall forthwith cause a public inquiry to be held in the locality in which the land is proposed to be acquired, and the council and all persons interested in the land and such other persons as the person holding the inquiry in his discretion thinks fit to allow shall be permitted to appear and be heard at the inquiry.

(4) Before confirming the order the Board shall consider the report of the person who held the inquiry, and all objections made thereat.

(5) The arbitrator shall, so far as practicable, in assessing compensation act on his own knowledge and experience, but, subject as aforesaid, at any inquiry or arbitration held under this schedule the person holding the inquiry or arbitration shall hear, by themselves or their agents, any authorities or parties authorised by or under this Act to appear, and shall hear witnesses, but shall not, except in such cases as the Board otherwise direct, hear counsel or expert witnesses.

(6) The Board may, with the concurrence of the Lord Chancellor, make rules fixing a scale of costs to be applicable on an arbitration under this schedule, and an arbitrator under this schedule may, notwithstanding anything in the Lands Clauses Acts, determine the amount of costs, and shall have power to disallow as costs in the arbitration the costs of any witness whom he considers to have been called unnecessarily, and any other costs which he considers to have been caused or incurred unnecessarily.

(7) In construing, for the purposes of this schedule or any order made thereunder, any enactment incorporated with the order, this Act together with the order shall be deemed to be the special Act and the council shall be deemed to be the promoters of the undertaking.

(8) Where the land is glebe land or other land belonging to an ecclesiastical benefice the order shall provide that sums agreed upon or awarded for the purchase of the land, or to be paid by way of compensation for the damage to be sustained by the owner by reason of severance or other injury affecting the land, shall not be

paid as directed by the Lands Clauses Acts, but shall be paid to the Ecclesiastical Commissioners to be applied by them as money paid to them upon a sale under the provisions of the Ecclesiastical Leasing Acts of land belonging to a benefice.

PART II.

PROVISIONS AS TO THE COMPULSORY HIRING OF LAND BY A COUNCIL.

(1) The Board shall make regulations for the purpose of carrying the order into effect and of protecting the council and the persons interested in the land, and the order shall incorporate such regulations, together with such provisions of the Lands Clauses Acts and of sections seventy-seven to eighty-five of the Railways Clauses Consolidation Act, 1845, as may, subject to the prescribed adaptations, appear to the Board necessary or expedient for that purpose.

(2) The order authorising the land to be hired compulsorily shall determine the terms and conditions of the hiring other than the rent, and in particular—

- (a) shall provide for the insertion in the lease of covenants by the council to cultivate the land in a proper manner and to pay to the landlord at the determination of the tenancy, on the council quitting the land compensation for any depreciation of the land by reason of any failure by the council, or any person deriving title under them, to observe such covenants or by reason of any user of the land by the council or such person as aforesaid, and (unless otherwise agreed) to keep the buildings and premises demised in repair; and
 - (b) shall not authorise the breaking up of pasture unless the Board are satisfied that it can be so broken up without depreciating the value of the land, or that the circumstances are such that small holdings cannot otherwise be successfully cultivated; and
 - (c) shall not except with the consent of the landlord confer on the council any right to fell or cut timber or trees or any right to take, sell, or carry away any minerals, gravel, sand, or clay, except so far as may be necessary or convenient for the purpose of erecting buildings on the land or otherwise adapting the land for small holdings or allotments, and except upon payment of compensation for minerals, gravel, sand, or clay so used.
- (3) The determination of—
- (a) The amount of the rent to be paid by the council for the land compulsorily hired;
 - (b) The amount of any other compensation to be paid by the council to any person entitled thereto in respect of the land or any interest therein, or in respect of improvements executed on the land or otherwise; and
 - (c) Where part only of a holding held for an unexpired term is hired, the rent to be paid for the residue of the holding during the remainder of that term;

shall in default of agreement be by valuation by a single valuer appointed by the Board: Provided that if the land hired is in the occupation of a tenant he may by notice in writing served on the council before the determination of his tenancy require that any claim by him against the council which, under the Agricultural Holdings (England) Acts, 1883 to 1906, might be referred to arbitration under those Acts shall be so referred, and in such case those claims shall be determined by arbitration under those Acts and not by valuation under this Act.

(4) The valuer, in fixing the rent to be paid for the land compulsorily hired, shall take into consideration the rent (if any) at which the land has been let and the annual value at which the land is assessed for purposes of income tax or rating, the loss (if any) caused to the owner by severance, the terms and conditions of the hiring, including any reservation of sporting or fishing rights, and all the other circumstances connected with the land, but shall not make any allowance in respect of any use to which the land compulsorily hired might otherwise be put by the owner during the term of hiring, being a use in respect of which the owner is entitled to resume possession of the land under this Act.

(5) Any compensation awarded to a tenant in respect of any depreciation of the value to him of the residue of his holding caused by the withdrawal from the holding of the land compulsorily hired shall, as far as possible, be provided for by taking

such compensation into account in fixing the rent to be paid for the residue of the holding during the remainder of the term for which it is held by the tenant.

(6) Any person interested in any valuation shall give the valuer all such assistance, information, and explanations as he may require, and shall produce to the valuer, or give him access to, all such books, accounts, vouchers, and other documents relating to the land to be compulsorily hired as he may reasonably require for the purposes of valuation, and such expenses as the valuer certifies to have been properly incurred by any person in furnishing such assistance, information, and explanations, or otherwise, in relation to the valuation, shall be paid by the council.

(7) On the determination of any tenancy created by compulsory hiring any questions as to the amount due by the council for depreciation, shall in default of agreement be determined by arbitration.

SECOND SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Short Title.	Extent of Repeal.
50 & 51 Vict. c. 48.	The Allotments Act, 1887.	Subsections (2) and (3) and, except so far as they are applied by any other enactment, subsections (4) to (8) of section three. Section four. Subsection (5) of section seven. Section nine. Subsections (2), (3), and (6) of section ten, and, except so far as it relates to urban sanitary authorities, the rest of that section. Subsection (2) of section eleven from "Provided that" to the end of the subsection. In section twelve, the words "if urban, or any parish in their district, if rural." Section fourteen.
53 & 54 Vict. c. 65.	The Allotments Act, 1890.	Subsection (1) of section two and in subsection (2) the words "by the inquiry hereinafter mentioned." Subsections (1), (2), and (3) of section three. Section four, from "and in the application of subsection (6)" to the end of paragraph (d). Subsection (2) of section six from "save that" to the end of the subsection. Subsection (3) of section six from "and in the case" to the end of the subsection.
55 & 56 Vict. c. 31.	The Small Holdings Act, 1892.	Subsection (2) of section one. Section two. Subsection (2) of section four to "Provided that." In subsection (3) of section four the words "in the case of small holdings which may be let." Section five. In section eleven the words "and then to the person or persons whose lands immediately adjoin the holding." Section sixteen. In section twenty the words from "and the expression 'electoral division'" to "shall mean ward," and the definition of "county elector."

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Session and Chapter.	Short Title.	Extent of Repeal.
56 & 57 Vict. c. 73.	The Local Government Act, 1894.	<p>In subsection (3) of section six the words "and of applying for the election of allotment managers," and "or the Allotments Act, 1890," and subsection (4) of the same section from "and for the purposes of section sixteen of the Small Holdings Act, 1892" to the end of the section.</p> <p>In subsection (3) of section nine, the words "or on any proceeding under the Allotments Acts, 1887 and 1890," and the words "or for the purpose of allotments, as the case may be."</p> <p>In subsection (5) of section nine, the words "or if the proceeding is taken on the petition of the district council, then the district council."</p> <p>In subsection (9) of section nine, the words "when made on the petition of a district council, by that council, and in any other case."</p> <p>Subsection (13) of section nine, to "is not so taken."</p> <p>In subsection (14) of section nine, the words "otherwise than for allotments," and from "and any land purchased" to the end of the subsection.</p> <p>Subsections (16), (17), and (18) of section nine.</p> <p>Section ten.</p>

THE

Relationship of Landlord and Tenant.

INTRODUCTION.

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By the law of England the absolute ownership of land is not admitted. It follows that, in one sense, every person possessed of or owning real property, by whatsoever tenure he holds, has nothing more than a *tenancy*, and is consequently himself only a *tenant*. It is, however, in a much more restricted sense that the latter term is employed in the present work: being applied throughout (with an occasional reference to tenants for their own or for others' lives) to the owners only of estates that are less than freehold (*a*). And whenever a person, whether the owner of the freehold or not, being possessed of an interest in real property, grants to another, for an annual or other periodical consideration, an estate or interest less than freehold, and less than he himself possesses therein, the relationship which is created is (as the terms are usually understood) that of landlord and tenant.

Estates that are less than freehold may be considered from this point of view under the following heads: estates or tenancies at will, tenancies from year to year, and tenancies for years. In addition, however, to these, any tenant, whether for years, from year to year, or at will, who "holds over" or continues in possession after the end of his term, without either the assent or the dissent of his landlord, is generally called a "tenant at sufferance," and his estate an "estate at sufferance;" but inasmuch as this

(*a*) 2 Black. Comm. cap. 9.

relationship cannot arise by contract (b)—for, immediately the landlord assents to it, it becomes a tenancy at will (c)—it wants the essential characteristic of all real tenancies, and is, indeed, a mere fiction of the law to prevent what would otherwise be an act of trespass (d).

Tenancies at will are tenancies which endure at the will of the parties only, *i.e.*, at the will of both (e); for if a demise be made to hold at the will of the lessor, the law implies that it is at the will of the lessee also, and *vice versâ* (f). This, however, is only where no term is fixed in the demise between the parties, except the will of the lessor (g); a demise, for instance, for ten years at the will of the lessor is not determinable at the will of the lessee, and is therefore not a tenancy at will (h). A tenancy at will, which must be founded on contract binding both parties (i), may be created by express words, *e.g.*, to hold “at the will and pleasure” of the lessor (k), or whilst the lessee “shall be permitted to remain tenant” (l), or “as long as both parties please” (m). It may also be created impliedly, as from a mere general letting (n), or even from the fact of occupation, without more, of premises by permission of their owner (o); but mere occupation without showing some affirmative (as distinguished from silent) consent on the part of the latter is not sufficient (p). Implied tenancies at will are, as hereafter explained, readily converted into tenancies from year to year (q).

Tenancies from year to year, like tenancies at will, may be created by express agreement between the parties (r), or may arise by implication of law (s). They belong to the class of what

(b) See *Barry v. Goodman*, 2 M. & W. 768.

(c) *Cole*, Ejec. 456. The *dictum* as to tenancy by sufferance attributed to Vaughan Williams, J., in *Mackay v. McGuire*, [1891] 1 Q. B. 250, would appear to be incorrect.

(d) 2 Black. Comm. 150; Co. Lit. 57 b.

(e) Co. Lit. 55 a; *Doe v. Davies*, 7 Exch. 89, per Pollock, C. B.

(f) Co. Lit. 55 a; *Spencer v. Harrison*, 5 C. P. D. at p. 104.

(g) Per Cotton, L. J., in next-cited case.

(h) *In re Threlfall*, 16 Ch. Div. 274, explaining *Morton v. Woods*, L. R. 4 Q. B. 293.

(i) *Ley v. Peter*, 3 H. & N. 101, per Bramwell, B.

(k) *Doe v. Cox*, 11 Q. B. 122.

(l) *Scobie v. Collins*, [1895] 1 Q. B. 375.

(m) *Richardson v. Langridge*, 4 Taunt. 128.

(n) *I.e.*, containing no stipulation as to the length of the term: *id.*, per Chambre, J.; *Ros v. Lees*, 2 W. Bl. 1171, per De Grey, C. J.

(o) *Doe v. Wood*, 14 M. & W. 682, per Parke, B. See p. 393, *post*.

(p) *Ley v. Peter*, *ubi sup.*; *Doe v. Rock*, Car. & M. 549; 4 M. & Gr. 30.

(q) See pp. 343, 395, *post*.

(r) For illustrations, see *post*, pp. 110, 111.

(s) See the origin of yearly tenancies explained in the notes to *Clayton v. Blakey*, 2 Sm. L. C. 129, 130 (11th ed.).

may be called "periodic" tenancies—*i.e.*, tenancies which, while the holding continues, repeat themselves from period to period. Other common instances of this are tenancies from quarter to quarter, from month to month, and from week to week; and both in yearly tenancies (*t*) (in which the tenant is regarded in law as having an interest for a year certain, with a growing interest during every year thereafter springing out of the original contract and parcel of it (*u*)) and in all others of a periodic nature (*x*), the holding, while the tenancy lasts, is continuous from period to period. The shorter "periodic" tenancies are of most frequent occurrence in the case of lodgings or furnished apartments, the contract with regard to which (where it is a contract of tenancy at all (*y*)) is in all respects save one (*z*) upon the same legal footing as the contract in the case of other tenancies.

Difficulties occasionally arise in fixing the precise character of a tenancy in the absence of express definition in the instrument creating it,—for instance, whether it be a yearly or quarterly, or a monthly or weekly, tenancy; but, inasmuch as these difficulties almost always occur in regard to what is the proper length of notice necessary to determine the tenancy, this matter will be best considered at a later stage (*a*). It may, however, here be stated that the question is one of fact upon all the circumstances of the case (*b*), but that the mode in which the rent is expressed to be reserved—*i.e.*, at so much a year, a quarter, &c.—affords a presumption that the tenancy is of a character corresponding to it (*c*): a presumption, however, which may be rebutted by regard to other parts of the instrument (*d*). If the rent reserved be expressed to be a yearly rent (or so much "per year") (*e*), the tenancy will be presumed to be a yearly tenancy, even though the rent be payable differently (*f*), *e.g.*, quarterly (*g*), or weekly (*h*); nor does it make any difference if power be given to the parties to determine

(*t*) See *Gandy v. Jubber*, 9 B. & S. 15. (*Tomkins v. Lawrence*, 8 C. & P. 729, *cont.*, has been disapproved: see *R. v. Thornton*, 2 E. & E. 788, per Crompton, J.)

(*u*) *Oxley v. James*, 13 M. & W. 209, per Parke, B.; *Cattley v. Arnold*, 1 J. & H. 651; *Wright v. Tracey*, 8 Ir. Rep. C. L. 478.

(*x*) *Bowen v. Anderson*, [1894] 1 Q. B. 164, disapproving of *dicta* to the contrary in *Sandford v. Clarke*, 21 Q. B. D. 398.

(*y*) As to this, see p. 8, *post*.

(*z*) See pp. 147, 148, *post*.

(*a*) See *post*, pp. 600 *et seq.*

(*b*) See *Towne v. Campbell*, 3 C. B. 921.

(*c*) *Wilkinson v. Hall*, 3 Bing. N. C. 508.

(*d*) See *Doe v. Grafton*, 18 Q. B. 496; *Atherstone v. Bostock*, 2 M. & Gr. 511 (where the letting was expressed to be "at the rate" of a certain sum per annum).

(*e*) But not otherwise: *R. v. Norwich Incorporation*, 30 L. T. 704.

(*f*) As to this, see p. 117, *post*.

(*g*) *Doe v. Grafton*, *supra*, per Wightman, J.

(*h*) *R. v. Herstmonceaux*, 7 B. & C. 551.

the tenancy within the year (*i*), or by a notice of specified length to be given at any time (*k*), for, as will be seen hereafter (*l*), a yearly tenancy may be determined by any notice agreed upon between the parties. On the other hand, *in the absence of any words from which a yearly tenancy can be implied*, an express stipulation that the tenant may always be dispossessed upon a quarter's notice (*m*), or upon a month's notice (*n*), raises the presumption that the tenancy is a quarterly or monthly tenancy, as the case may be.

Tenancies for years are discussed at length in the sequel.

(*i*) *R. v. Herstmonceux*, *supra*.

(*k*) *King v. Eversfield*, [1897] 2 Q. B. 475.

(*l*) *Post*, p. 604.

(*m*) *Kemp v. Derrett*, 3 Camp. 510.

See this and other similar cases set out *post*, pp. 609, 610.

(*n*) *Doe v. Gower*, 17 Q. B. 589, per Patteson, J. The tenancy here was expressed to be at a weekly rent.

Part I.

CREATION OF THE RELATIONSHIP.

Book I.

MODES OF CREATION.

THE relationship of landlord and tenant may be created in different modes. These are:—By lease, by entry under agreement for lease, by occupation under implied demise, by assignment, by attornment, and by estoppel.

These modes of creating the relationship it is proposed to treat of successively.

CHAPTER I.

THE LEASE.

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A LEASE is a conveyance by which a person, having an estate in hereditaments, transfers a portion of his interest therein to another, usually in consideration of a certain periodical rent or other recompense (*a*). If he transfer the whole of his interest, or a greater interest than he himself possesses, the conveyance, as will be explained hereafter (*b*), operates in general not as a lease, but as an assignment.

The term imports that *exclusive possession* is given of the premises conveyed.

First, there must be a possession in the legal sense. The possession, for instance, by a servant or agent, of premises belonging to his master or principal, which he is required by the latter to occupy (or the occupation of which is necessary) for the performance of his duties (*c*)—as distinguished from the possession of premises which he is *permitted* to occupy by way of remuneration for his services (*d*)—creates no tenancy between the parties (*e*); and the mere fact that the servant may use the premises at the

(a) 2 Black. Comm. 317.

(b) See *post*, p. 413.

(c) *R. v. Spurrell*, L. R. 1 Q. B. 72, per Cockburn, C. J.; *Fox v. Dalby*, L. R. 10 C. P. 285, following *Clark v. Overseers of Bury*, 1 C. B. N. S. 23.

(d) *Hughes v. Overseers of Chatham*, 5 M. & Gr. at p. 78, per Tindal, C. J.;

Smith v. Seghill, L. R. 10 Q. B. 422; *Marsh v. Estcourt*, 24 Q. B. D. 147; *Dover v. Prosser*, [1904] 1 K. B. 84. The Agricultural Holdings Act, however, as will be seen hereafter (*post*, p. 728), excludes from its scope tenancies founded on such possession.

(e) *Mayhew v. Suttle*, 4 E. & B. 347; *affd.* (Ex. Ch.), *id.*, 357.

same time for an independent business of his own (*f*), or that his wages or salary may be diminished by way of rent for his occupation (*g*), or that there may be an express stipulation for the determination of such occupation by a notice of specified length (*h*), will not make any difference.

Secondly, it must be an exclusive possession: otherwise the instrument, though it may be called a letting by the parties (*i*), is not a lease, but a mere licence (*k*). This has been expressed by saying that to constitute a person a lessee, he must have some right in land carved out of the estate of his landlord (*l*). But if exclusive possession be given, the fact that the period for which user is granted is not continuous—as where premises are let by one entire contract for successive public holidays for purposes of entertainment—will not (as it has been held) prevent the agreement from being one of real letting (*m*). And if the effect of the instrument be to give an exclusive right of occupation of land, the fact that it may be subject to certain reservations, or to a restriction of the purposes for which it may be used, will not make it the less a demise (*n*).

An instrument, for instance, giving a company the use of certain premises only for a particular purpose, and only at particular times, does not create a tenancy (*o*). So the letting at a weekly rent of a stall at an exhibition from which the person taking it is excluded a certain time every day is a mere licence and not a lease (*p*). And an agreement to allow a person to erect a hoarding upon the forecourt of one cottage, “together with the end or gable wall” of another, for purposes of advertisement, at a specified rent “per annum payable quarterly on the four usual quarter days,” has been held to have the same operation (*q*).

Similarly the grant, by the lessee of a theatre, of the exclusive right to the use of the refreshment rooms and bars therein has been

(*f*) *White v. Bayley*, 10 C. B. N. S. 227.

(*g*) *Bertie v. Beaumont*, 16 East, 33; *Hunt v. Colson*, 3 M. & Sc. 790; *Hughes v. Overseers of Chatham*, 5 M. & Gr. at p. 79.

(*h*) *Mayhew v. Suttle*, *supra*.

(*i*) *Taylor v. Caldwell*, 3 B. & S. 826; *Edwards v. Summerton*, W. N. 1899, p. 120.

(*k*) *Watkins v. Overseers of Milton*, L. R. 3 Q. B. 350; *L. & N. W. Ry. Co. v. Buckmaster*, L. R. 10 Q. B. 70, 444; *Bobbett v. S. E. Ry. Co.*, 9 Q. B. D. 424;

Smith v. Lambeth Assessment Committee, 9 Q. B. D. 585; 10 Q. B. Div. 327.

(*l*) *Keith v. Twentieth Century Club*, 52 W. R. 554, per Buckley, J.

(*m*) See *Smallwood v. Sheppards*, [1895] 2 Q. B. 627.

(*n*) *Glenwood Lumber Co. v. Phillips*, [1904] A. C. 405.

(*o*) *Municipal, &c., Land Co. v. Metropolitan, &c., Joint Committee*, C. & E. 184, Cave, J.

(*p*) *Rendell v. Roman*, 9 T. L. R. 192.

(*q*) *Wilson v. Tavener*, [1901] 1 Ch. 578.

held not to amount to more than a licence, even though in many respects the terms of the instrument were appropriate only to a demise (*r*). So the position of an inmate of a boarding-house (*s*), or of a guest at an inn (*t*), who has "a mere easement of sleeping in one room and eating and drinking in another" (*u*), is not, in the absence at all events of a distinct agreement for the occupation of a particular room (*x*), that of a tenant.

The case of a lodger demands special notice. Without attempting a definition of the word, it may be observed that (as has been said) there is involved in its use that a man must lodge in the house of another man, and lodge with him (*y*). The fact that the landlord resides in the house is not in itself conclusive that persons in the occupation of separate portions of it are lodgers, the test being always whether he has the right of control over those portions; nor does the circumstance that the landlord pays the rates and does the general repairs of the house make any difference (*z*). There are two classes of cases in which it is submitted that, within the above rule, no tenancy properly exists. First, where, though the bargain is for specific rooms, the landlord resides, by himself or by his servants, in the house, and the contract includes the supply of what is usually known as "attendance" (*a*). Secondly, where, though the bargain is for specific rooms, and the landlord resides in the house, there is no contract for attendance, but the landlord has the exclusive control of the outer door (*b*); or it is shown, by the terms of the letting where they are in writing, or by parol evidence where they are not (*c*), that he retains the dominion and control of the whole house (*d*). In both these cases it would seem clear that the occupier, if disturbed in his enjoyment, could not—

(*r*) *Daly v. Edwardes*, 82 L. T. 372; affd., C. A., 83 L. T. 548, and H. L. (*sub nom. Edwardes v. Barrington*), 85 L. T. 650; *Warr v. London County Council*, [1904] 1 K. B. 713.

(*s*) *Wright v. Stavert*, 2 E. & E. 721.

(*t*) See *Bradley v. Baylis*, 8 Q. B. Div. 195, at p. 216, per Jessel, M. R.

(*u*) *Lane v. Dixon*, 3 C. B. at p. 784, per Maule, J.

(*z*) *Greenslade v. Tapscott*, 1 C. M. & R. 55, per Parke, B. See, however, next paragraph, which seems to render this reservation unnecessary.

(*y*) *Bradley v. Baylis*, *supra*, per Cotton, L. J.

(*x*) *Kent v. Fittall*, [1906] 1 K. B. 60; commented on in *Douglas v. Smith*, [1907] 1 K. B. 126; affd., 23 T. L. R. 612.

(*a*) *Smith v. St. Michael's, Cambridge*,

3 E. & E. 383 (reported as *R. v. Smith*, 30 L. J. M. C. 74); *Roads v. Overseers of Trumpington*, L. R. 6 Q. B. at p. 62; *Allan v. Overseers of Liverpool*, L. R. 9 Q. B. 180, per Blackburn, J. It should be noticed that in neither of the cases referred to hereafter (p. 354, note (*i*), *post*), where a lodger was held to have an interest in land within the Statute of Frauds, does it appear that such attendance was furnished.

(*b*) *R. v. St. George's Union*, L. R. 7 Q. B. 90, per Cockburn, C. J. (reported as *Mutual Tontine, &c., Association v. St. George's Union*, 25 L. T. 696); *Monks v. Dykes*, 4 M. & W. 567.

(*c*) Per Blackburn, J., *R. v. St. George's Union*, *supra*.

(*d*) See *Smith v. Lambeth Assessment Committee*, 9 Q. B. D. 585, per Field, J.

contrary to the usual rule in the letting of apartments (*e*)—main-
tain trespass, but could only sue on the contract (*f*); that he has
consequently no exclusive occupation, but only an exclusive
enjoyment (*f*); and that therefore no tenancy exists between the
parties in the proper sense of the word. It may be mentioned
here that, in the absence of agreement to the contrary, a lodger
has the right to the use of everything necessary to his enjoyment
of the premises, *e.g.*, the door bell, door knocker, skylight of the
staircase, and water-closet (*g*).

A licence passes no estate or interest in the premises (*h*), and,
whether made by deed or not (*i*), is, unless coupled with a
grant (*i*), or necessarily attended in its execution with expense
to the licensee (*k*), always revocable (*l*) upon reasonable notice (*m*)
by the grantor. But to take the case out of the rule the grant in
question must be a *valid* grant, and not, for instance, the grant of
an incorporeal hereditament without deed (*n*).

A licence, moreover, cannot, unless coupled with an interest in
land (*o*), be assigned, like a lease (*p*), to a third party (*q*); it
confers upon the licensee no title to sue strangers in respect of
it in his own name (*r*), and it is at once determined on the grantor
ceasing to own the property over which it is exercised (*s*).

The term *lease* is generally employed to denote an instrument
of demise under seal (*t*), but it may also be applied to a demise by
parol (*u*). A lease may be made not only of corporeal heredita-
ments, such as lands and houses, but also of those that are
incorporeal, such as tolls, tithes, rights of way, &c. (*x*). The prin-
ciples governing the mode in which leases of each of these two
classes of hereditaments may be made are different.

(*e*) *Lane v. Dixon*, 3 C. B. 776.

(*f*) Cases *supra*, notes (*a*) and (*b*).

(*g*) *Underwood v. Burrows*, 7 C. & P. 26.

(*h*) *Thomas v. Sorrell*, Vaugh. at p. 351. Compare *Bird v. G. E. Ry. Co.*, 19 C. B. N. S. 268.

(*i*) *Wood v. Leadbitter*, 13 M. & W. 838, per Alderson, B.

(*k*) *Winter v. Brockwell*, 8 East, 308; *Liggins v. Inge*, 7 Bing. 682.

(*l*) As to the right to recover damages upon its revocation, see *Kerrison v. Smith*, [1897] 2 Q. B. 445.

(*m*) *Cornish v. Stubbe*, L. R. 5 C. P. 334; *Mellor v. Watkins*, L. R. 9 Q. B. 400; *Aldin v. Latimer Clark & Co.*, [1894] 2 Ch. 437; *Wilson v. Tavener*, [1901] 1 Ch. 578.

(*n*) *Wood v. Leadbitter*, *supra*. How

far these results are affected by the equitable doctrines introduced by the Jud. Acts (*infra*, p. 13) has been said to be doubtful: see *Lowe v. Adams*, [1901] 2 Ch. 598, per Cozens-Hardy, J.

(*o*) *Muskett v. Hill*, 5 Bing. N. C. 694.

(*p*) See p. 411, *post*.

(*q*) See *In re Davis*, 22 Q. B. Div. 193.

(*r*) See *Heap v. Hartley*, 42 Ch. Div. 461.

(*s*) *Wallis v. Harrison*, 4 M. & W. 538; *Coleman v. Foster*, 1 H. & N. 37.

(*t*) As to sealing and delivering as requisites of an instrument by deed, see Leake on Contracts, pp. 87–90 (3th ed.), and cases there cited.

(*u*) See *Bridgland v. Shapter*, 5 M. & W. 375, per Lord Abinger, C. B.

(*x*) See p. 18, *infra*.

Leases of corporeal hereditaments.—At common law a lease for years of corporeal hereditaments might have been made for any length of term by parol (*y*). But by the Statute of Frauds (*z*) it was enacted (*a*) that all leases not in writing signed by the parties making them or their agents thereunto lawfully authorized by writing should have the force, both at law and in equity, of estates at will only. Leases, however, not exceeding three years from the making thereof, whereon the reserved rent is equal to two-thirds at least of the improved value of the premises, are excepted (*b*), even though such leases may be only to commence *in futuro* (*c*); and if such a lease be made by parol its terms may always be proved by parol evidence (*d*). But a lease for three years to commence at a future day, as it exceeds three years “from the making,” cannot be made by parol (*e*). The Statute of Frauds applies only where the tenancy must of necessity last more than three years, and not where, at the time of the arrangement, it may last for less, though it may last for more (*f*):—as in the case of an ordinary tenancy from year to year (*g*). Nor does its provision requiring a party’s signature extend to leases under seal (*h*).

A further Act passed in the year 1845 (8 & 9 Vict. c. 106) provides (*i*) that a lease required by law to be in writing shall be void at law unless made by deed. The Statute of Frauds, moreover (*k*), as will be shown more fully hereafter (*l*), forbids an action to be brought upon any agreement for a lease for a term however short, unless such agreement be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

But the rigour of these statutory provisions has been considerably mitigated by the courts both of law and equity. By the former, “estate at will,” in the 1st section of the Statute of Frauds, was construed to mean an estate at will *in the first instance*, but convertible into a yearly estate or tenancy by the subsequent acts of the parties (*m*). Thus, occupation and payment of rent

(*y*) Except leases by corporations:
post, p. 46.

(*z*) 29 Car. 2, c. 3.

(*a*) Sect. 1.

(*b*) Sect. 2.

(*c*) *Hyley v. Hicks*, 1 Str. 651.

(*d*) *Bolton (Lord) v. Tomlin*, 5 A. & E. 856.

(*e*) *Foster v. Reeves*, [1892] 2 Q. B. 255; *Rawlins v. Turner*, 1 Ld. Ray. 736.

(*f*) *Ex parte Voisey*, 21 Ch. Div. at p. 458, per Brett, L. J.

(*g*) *Hammond v. Farrow*, [1904] 2 K. B. 332, per Wills, J.

(*h*) *Areline v. Whisson*, 4 M. & Gr. 801. See *Williams's Real Property*, p. 154 (20th ed.).

(*i*) Sect. 3.

(*k*) Sect. 4.

(*l*) See *post*, pp. 353 *et seq.*

(*m*) *Doe v. Bell*, 5 T. R. 471; *Clayton v. Blakey*, 8 T. R. 3; 2 Sm. L. C. 119, 127; *post*, p. 343.

under a lease inoperative by the statute were held to create, during the remainder of the proposed term, a tenancy which *primâ facie* was a tenancy from year to year upon the terms of such lease, so far as they were not inconsistent with a yearly holding; an agreement for a yearly tenancy being implied from acts which were taken to show an intention to create it (*n*). (The same rule applies, too, in the case of a demise void at common law (*o*), or by reason of not complying with the requirements of any other statute (*p*).)

The presumption of a yearly tenancy, however—displacing the tenancy at will created by the Statute of Frauds (and implied in the other cases (*q*) from the mere fact of occupation)—is liable to be rebutted by evidence (*r*), *e.g.*, by a gross disparity between the rent received and the real annual value (*s*). And, as will be shown more fully hereafter (*t*), in exactly the same way, where, instead of a void lease, there was an agreement, whether valid or invalid under the 4th section of the Statute of Frauds, to grant a future lease, followed by entry and payment of rent thereunder, the tenancy was likewise regarded as *primâ facie* a tenancy from year to year, upon such of the terms of the proposed lease as were applicable thereto (*u*). Nor was the attitude of the courts of common law in this matter altered by the 8 & 9 Vict. c. 106, s. 3; for the expression “void at law” in that section was construed by them to mean void *as a lease*, but valid as an agreement (*x*); and though in each of the decisions on this question (*y*) the instrument of demise was obviously capable of being construed as an agreement, it may probably be inferred that such an instrument, even if couched in words incapable of being regarded otherwise than as expressing an intention to effect an immediate demise (*z*), would, nevertheless, be good as an agreement (*a*). The result, therefore, was that entry and payment of rent under a lease falling within this statute also created a tenancy from year to year.

(*n*) See 2 Sm. L. C. 120, notes to *Doe v. Bell*, *supra*.

(*o*) *Doe v. Watts*, 7 T. R. 83; *Doe v. Morse*, 1 B. & Ad. 365; *Eccles. Commissioners v. Merril*, L. R. 4 Ex. 162.

(*p*) *E.g.*, the provisions of mortmain: *Magdalen Hospital v. Knotts*, 4 App. Ca. 324, per Lord Selborne; *Bunting v. Sargent*, 13 Ch. D. 330.

(*q*) See *ante*, p. 2, and *post*, p. 393.

(*r*) See *post*, p. 395.

(*s*) See *Roe v. Prideaux*, 10 East, 158; *Smith v. Widdlake*, 3 C. P. Div. 10.

(*t*) *Post*, p. 343.

(*u*) *Chapman v. Towner*, 6 M. & W. 100.

(*x*) *Bond v. Rosling*, 1 B. & S. 371; *Rollason v. Leon*, 7 H. & N. 73; *Tidey v. Mollett*, 16 C. B. N. S. 298. (These decisions may be regarded as overruling *Stratton v. Pettit*, 16 C. B. 420.)

(*y*) Cases just cited.

(*z*) As to this, see *post*, p. 75.

(*a*) Dav. Prec. Conv. vol. 5, pt. 1, p. 17 (3rd ed.).

But the courts of equity, notwithstanding the fact that sect. 1 of the Statute of Frauds is in terms binding "both at law and in equity," went further still. By the extension to cases under this statute of the doctrine of part performance (*b*), any party to a lease, or to an agreement for a lease, void under this statute but capable of being specifically enforced, who had given or taken possession thereunder, was not only held entitled to require the other party to execute a valid lease, but was treated as actual lessor or lessee under a valid lease from the time of possession being so taken (*c*). And the courts of equity further held, in this respect following the line taken by the courts of law (*d*), that a demise void as such under the 8 & 9 Vict. c. 106, s. 3 (the words of which, as will be noticed, are only "void at law"), was nevertheless (although containing words of present demise) valid as an agreement, and consequently capable of being specifically enforced (*e*). Thus, while at law the tenant who took possession under a void lease or under a mere agreement (whether valid or invalid) remained nothing more than a tenant at will until he had paid rent, and thenceforward became tenant from year to year,—in equity, provided his claim to specific performance was one which could not be resisted (*f*), he was regarded as a tenant under the lease from the moment he took possession. Hence, for example, where in such a case a lessor, treating his lessee as a yearly tenant, brought ejectment (*g*) against him upon the usual notice to quit (*h*), and the lessee thereupon claimed specific performance of the lease in a court of equity, that court assumed jurisdiction to restrain the lessor's proceedings in ejectment until the hearing of the lessee's claim for specific performance (*i*).

(It is interesting to note that in one case, decided by Lord Mansfield, the ejectment proceedings actually failed in a court of law, on the ground that specific performance of the agreement would clearly be decreed in equity (*k*). But "great inconveniences," as we are told by a high authority (*l*), resulted from the decision; though these, as he says, were "happily got rid of" by the effect of subsequent judgments (*m*). Lord Mansfield's

(*b*) As to this, see *post*, pp. 360—365.

(*c*) See the remarks of Jessel, M. R., in *Walsh v. Lonsdale*, 21 Ch. Div. 9, cited *infra*, pp. 13, 14.

(*d*) *Supra*, p. 10.

(*e*) *Parker v. Taswell*, 2 De G. & J. 559.

(*f*) As to this, see *post*, pp. 345 *et seq.*

(*g*) As to this, see *post*, pp. 765 *et seq.*

(*h*) As to this, see *post*, pp. 600 *et seq.*

(*i*) *Browne v. Warner*, 14 Ves. 156, 409; *Parker v. Taswell*, *supra*.

(*k*) *Weakly v. Bucknell*, Cowp. 473.

(*l*) Lord Redesdale, in *Shannon v. Bradstreet*, 1 Sch. & L. at p. 67.

(*m*) See also the reporter's note to *Doe v. Wroot*, 5 East, 132.

decision was an anticipation of the Judicature Acts by exactly a century.)

Upon this state of things the Acts just referred to supervened, and the effect of the fusion of law and equity upon this matter is well illustrated in a leading case (*n*) decided by the Court of Appeal in the year 1882. The plaintiff was tenant in occupation of certain premises from the defendant under an agreement for a lease which provided for the payment on demand of a whole year's rent in advance. (Though the holding in this case was under an agreement, precisely the same reasoning applies to a holding under an actual demise invalid by the Statute of Frauds and the 8 & 9 Vict. c. 106, s. 3, because such an instrument, as already pointed out (*o*), though void as a lease, is good as an agreement.) He had entered and paid rent, so that his position at law, as just explained, was that of tenant from year to year under such of the terms of the proposed lease as were consistent with a yearly tenancy. The landlord had demanded a year's rent in advance, and two days later, it being unpaid, put in a distress (*p*). The tenant thereupon brought an action in the Chancery Division claiming damages for wrongful distress, an injunction to restrain the defendant from continuing in possession under the distress, and specific performance of the agreement. Upon his behalf it was contended that the stipulation for payment of a whole year's rent in advance at all times on demand was not applicable to the yearly tenancy created (both because the rent was incapable of being ascertained before the end of the year (*q*), and because, as such a tenancy is always determinable at a half-year's notice (*r*), the tenant might be turned out of possession while the period for which he had paid rent was still running (*s*)), and that consequently the landlord could not exercise a right of distress for rent so payable in advance, as long as specific performance had not in fact been ordered. But Sir G. Jessel, M. R., said (*t*): "A tenant holding

(*n*) *Walsh v. Lonsdale*, 21 Ch. Div. 9.

(*o*) *Supra*, pp. 10, 11. As to leases void at common law, see *infra*, p. 17.

(*p*) As to this, see Book II., *post*.

(*q*) *Post*, p. 482. The demise was of a mill, and the rent was made to depend upon the number of looms—not being less than a certain number, so that a minimum rent was provided for—which should be "run" in the course of a year.

(*r*) *Post*, p. 607.

(*s*) See 2 Sm. L. C. at p. 122, notes to *Doe v. Bell*.

(*t*) The subjoined passages from his judgment (which on account of their importance are set out at length) are, it is submitted, essential to the decision, and in no sense *obiter dicta*, because, on any other basis, the distress must have been unlawful for the reasons just given; for though the former objection might have been overcome by means of the minimum rent, the latter would have remained insuperable.

under an agreement for a lease *of which specific performance would be decreed* (u) stands in the same position as to liability as if the lease had been executed. He is not, since the Judicature Act, a tenant from year to year: he holds under the agreement, and every branch of the court must now give him the same rights. . . . There is an agreement for a lease under which possession has been given. Now, since the Judicature Act the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted: he cannot be turned out by six months' notice as a tenant from year to year. He has a right to say, 'I have a lease in equity, and you can only re-enter if I have committed such a breach of covenant as would, if a lease had been granted, have entitled you to re-enter according to the terms of a proper proviso for re-entry.' That being so, it appears to me that, being a lessee in equity, he cannot complain of the exercise of the right of distress merely because the actual parchment has not been signed and sealed." And the other members of the Court also held that the rights of the parties must depend upon the terms of the lease, *as it ought to be framed* in pursuance of the agreement between them.

The principle of the above decision has been followed in several subsequent cases (x); nor is it apparently even necessary (though always advisable (y)) that the party who claims the benefit of equitable doctrines as to the tenancy should ask for specific performance in the action (z). The doctrine, however (as it has been held), only applies where the court in which the action is brought

(u) *Coatsworth v. Johnson*, 55 L. J. Q. B. 220, shows that it is otherwise where that remedy is not available.

(x) *E.g.*, *Allhusen v. Brooking*, 26 Ch. D. 559; *In re Maughan*, 14 Q. B. D. 956; *Crumph v. Temple*, 7 T. L. R. 120; and

by the Court of Appeal in *Lowther v. Heaver*, 41 Ch. Div. 248.

(y) The claim should be "properly brought forward." See Jud. Act, 1873, s. 24 (7).

(z) *Furness v. Bond*, W. N. 1888, p. 78; 4 T. L. R. 457.

has competent jurisdiction both at law and in equity; hence, where a tenant who had entered under an instrument of demise void as a lease (though good as an agreement (*a*)) left after giving six months' notice, and the value of the premises exceeded the amount (*b*) which would have entitled a County Court to decree specific performance of the agreement, it was held that that Court had no right to treat the tenant as in under the agreement, and consequently to hold him liable for rent accrued due after he relinquished possession (*c*). Moreover, it applies only to cases where there is a contract to transfer a legal title, and an act has to be justified or an action maintained by force of the legal title to which such contract relates (*d*). It involves two questions: first, is there a contract of which specific performance can be obtained? Secondly, if yes, will the title acquired by such specific performance justify at law the act complained of, or support at law the action in question (*d*)? It is to be treated as though before the Judicature Act there had been first a suit in equity for specific performance, and then an action at law between the same parties; and the doctrine is applicable only in those cases where specific performance can be obtained between the same parties, in the same court, and at the same time, as the subsequent legal question falls to be determined (*d*).

The practical result of the whole is that, where possession has been given, the statutes restricting the ancient common law right of making leases in any manner by imposing formalities of writing and sealing, are, in those cases where relief is to be obtained by specific performance (*e*), at the present day of no effect: and inasmuch as that relief, as will be seen hereafter (*f*), will, as a rule, be granted in every case where a concluded agreement, though verbal only, is followed by the delivery of possession, it

(*a*) *Supra*, p. 11.

(*b*) *See post*, p. 345.

(*c*) *Forster v. Heeres*, [1892] 2 Q. B. 255. Sect. 89 of the Jud. Act, 1873, does not seem to have been referred to. It may be added that both this and the following section (sect. 90), as well as the Jud. Act, 1884 (47 & 48 Vict. c. 61), s. 18, show that a defendant stands in this respect on a different footing to a plaintiff; and that if sued in an inferior court he cannot be prevented from setting up—but only (except by consent) as an answer to, and to the extent of, the claim made against him—a defence and counterclaim involving matters beyond its jurisdiction.

(*d*) Per Farwell, J., in *Manchester Brewery Co. v. Coombe*, [1901] 2 Ch. 608 (referred to also *infra*, p. 17). It would appear, however, to have escaped attention in this case that the tenancy intended to be created by the instrument of demise being one from year to year, the legal estate, in spite of the non-execution of the deed by the lessors, became vested in the lessee by the entry and payment of rent, and the aid of the equitable doctrine appears therefore unnecessary.

(*e*) As to this, see *post*, pp. 345 *et seq.*

(*f*) *Post*, p. 363.

may be inferred that tenancies in corporeal hereditaments can in such cases be created in any manner whatever.

The same principle may now definitely be said to apply in the case of those anomalous instruments, hereafter referred to more in detail (*g*), where to a "periodic" letting by the week, month, quarter, or year there is added a stipulation on the part of the lessor that, whilst the rent is paid regularly or some other condition fulfilled by the lessee, the tenancy shall not be determined or the possession disturbed by the former. It was at one time held (*h*) that in the absence of a deed (which, where there had been no livery of seisin, was necessary at common law for the creation of a freehold interest (*i*)) the right to specific performance depended on whether the document was a mere agreement for a lease or amounted to an actual demise (*k*); and that in the latter event the provision against the determination of the holding was invalid, and could be altogether disregarded as being repugnant to the nature of the "periodic" tenancy created by the instrument (*l*). It seems, however, clear that at the present day the above case—being that of a feoffment not "evidenced by deed"—would (like the case of an ordinary lease required by law to be in writing (*m*)) fall within the scope of the stat. 8 & 9 Vict. c. 106, s. 3; that under this statute the instrument in question would be merely "void at law;" that it would be good as an agreement, whether amounting to an actual demise or not; that specific performance of such an agreement being available, the instrument, with its provision against determination by the lessor, would be capable of being fully enforced; and that the effect of the arrangement would be to convey a conditional estate for the life of the lessee (*n*).

There is, however, as it is thought, an exception to the above general rule which should not be overlooked. In the case of an agreement for letting merely inoperative under the Statute of

(*g*) See *post*, p. 112.

(*h*) *Browne v. Warner*, 14 Ves. 156.

(*i*) Possibly all that Lord Eldon, L.C., intended as to this in the last-cited case (see at p. 158 of the report) was that (there having been no livery of seisin) the only way of conveying a freehold interest was by means of a release, for which a deed of *some* kind was necessary. But if, as would seem to be the case, he meant to suggest that the instrument of letting there in question might have conveyed an estate for life if it had been made by deed, this would scarcely appear to be correct; for as it was exe-

cuted before and not after the delivery of possession (cf. *Doe v. Browne*, 8 East, 165), it could not have operated as a release. See Litt. ss. 59, 459.

(*k*) See *post*, p. 74.

(*l*) *Browne v. Warner*, *supra*: followed by the C. A. in *Cheshire Lines Committee v. Lewis*, 50 L. J. Q. B. 121, apparently *per incuriam*, the statute next mentioned not having been referred to.

(*m*) *Supra*, p. 11.

(*n*) *Zinbier v. Abrahams*, [1903] 1 K.B. 577, C. A., following *Mardell v. Curtis*, W. N. 1899, p. 93.

Frauds the contract itself is perfectly valid and the only effect of the statute (*o*) is that in a contested suit no evidence can be given of that contract unless the formalities prescribed have been observed, the Court under certain circumstances (*p*) allowing those formalities to be dispensed with and the evidence to be given in their absence (*q*). But in the case of a letting by a corporation not under their common seal the contract itself is void in the sense that no contract exists of which specific performance can apparently be given at all (*r*). Hence to such a case the doctrine here discussed is, as it would seem, inapplicable, and the tenancy from year to year created by entry and payment of rent (*s*) still continues (*t*); though even here, as in all similar cases (*u*), the existence of a tenancy at all is only based on a presumption, which will have no place if some explanation of the occupation (other than that of trespass, which is negatived by the payment of rent) be forthcoming (*x*).

It should, moreover, be observed that it is not to be inferred that (even where the remedy of specific performance is available) an agreement for a lease is *for all purposes* equivalent to an actual lease. Thus, where a statute deals with "leases," agreements are not necessarily within its scope (*y*), and at all events will not be held to be within it if specific performance of them would for any reason be withheld (*z*). And, in any case, the equivalence of agreements and leases only applies as between the parties themselves, and not where the rights of strangers come in question (*a*). At the same time, the statement that the doctrine here referred to does not "affect the rights of third parties" (*b*) must not be taken too literally; and the sub-tenant, for instance, of a person entitled to the benefit of it would, it is thought, be able to enforce it against the head lessor.

(*o*) The enactment referred to in the last paragraph may for this purpose be regarded as a mere extension of the Statute of Frauds.

(*p*) See pp. 360—365, *post*.

(*q*) *Hunt v. Wimbledon Local Board*, 4 C. P. Div. 48, per Brett, L. J.

(*r*) See *post*, p. 364.

(*s*) *Supra*, p. 11.

(*t*) *Doe v. Taniere*, 12 Q. B. 998; *Wood v. Tate*, 2 N. R. 247; *Eccles. Commissioners v. Merril*, L. R. 4 Ex. 162.

(*u*) See this matter discussed, pp. 343, 395, *post*.

(*x*) *In re Northumberland Avenue Hotel Co.*, 33 Ch. Div. 16, per Cotton, L. J.

(*y*) See, *e.g.*, the Conv. Act, 1881 (44 & 45 Vict. c. 41), s. 18, sub-s. 17.

(*z*) *Swain v. Ayres*, 21 Q. B. Div. 289. See this matter discussed *post*, p. 667.

(*a*) See *Brook v. Biggs*, 2 Bing. N. C. 572; *Bird v. G. E. Ry. Co.*, 19 C. B. N. S. 268; and for a parallel case, *Tasker v. Small*, 3 My. & Cr. at p. 70, per Lord Cottenham, L. C., followed in *Commissioners of Inland Revenue v. Angus*, 23 Q. B. Div. 579. For other illustrations of the distinction, too, see *post*, pp. 74, 112, 142.

(*b*) Per Farwell, J., in *Manchester Brewery Co. v. Combs*, [1901] 2 Ch. at p. 618.

Leases of incorporeal hereditaments.—As already observed (*c*), leases may be made of incorporeal as well as of corporeal hereditaments (*d*). The following hereditaments, for instance, of this class may (amongst others) be demised at common law: Advowsons (*e*), tithes (*f*), tolls (*g*), ferries (*h*), annuities (*i*), offices (*k*) (except those concerned with the administration of justice (*l*)), rights of way (*m*), of common (*n*), of fishing (*o*), or of sporting generally (*p*), and the vesture or herbage of land (*q*). The word “lease” is sometimes also applied to the hiring of personal property, such as chattels, furniture, and live stock (*r*), especially where such hiring forms part of the same transaction with the hiring of land (*s*): as in the not infrequent case of the demise of a farm with live stock upon it (*t*), or with the use and pasture of cattle thereon (*u*), or of rooms in a mill with the supply of power (*x*), and the still more familiar instance of the letting of a furnished house (*y*).

A lease of incorporeal hereditaments, which lie, as it is said, in grant, and not in livery (*z*), is required by the common law to be by deed, however short be the term for which it is made. A lease, for example, of tithes (*a*), of a fishery in a river (*b*), of rights of shooting and fishing (*c*), and of a right of way or a right of passage

(*c*) *Supra*, p. 9.

(*d*) 1 Platt on Leases, 24. Incorporeal hereditaments, however, are not treated of in this work (except as incidental to those that are corporeal).

(*e*) Co. Lit. 47 a. But leases of advowsons are now forbidden by statute (61 & 62 Vict. c. 48, s. 1; see sub s. 1 (*b*)).

(*f*) Co. Lit. 47 a; *Cox v. Brain*, 3 Taunt. 95.

(*g*) *Markham v. Stanford*, 14 C. B. N. S. 376; *Bridgland v. Shapter*, 5 M. & W. 375; *Shepherd v. Hodsmen*, 18 Q. B. 316.

(*h*) *R. v. Nicholson*, 12 East, 330; *Peter v. Kendal*, 6 B. & C. 703.

(*i*) Co. Lit. 144 b.

(*k*) Co. Lit. 47 a.

(*l*) Bac. Ab. Leases (A.).

(*m*) *Newmarch v. Brandling*, 3 Swanst. 99.

(*n*) Co. Lit. 47 a; *Sury v. Brown*, Latch, 99.

(*o*) *Somerset (Duke of) v. Fogwell*, 5 B. & C. 875; *Grove v. Portal*, [1902] 1 Ch. 727; *Cooper v. Phibbs*, L. R. 2 H. L. 149.

(*p*) *Bird v. Higginson*, 6 A. & E. 824; *West v. Houghton*, 4 C. P. D. 197.

(*q*) Co. Lit. 47 a; *Masters v. Green*, 20

Q. B. D. 807. (With the use of cattle thereon: *Burt v. Moore*, 5 T. R. 329.)

(*r*) Bac. Ab. Leases (A.); *Spencer's case*, 5 Co. 16 a.

(*s*) A demise of the use of a thing on hired land, unless a contrary intention appear, is a demise of the thing itself: *Rhodes v. Bullard*, 7 East, 116, per Lord Ellenborough, C. J.

(*t*) *Holme v. Brunskill*, 3 Q. B. Div. 495.

(*u*) *Tudgay v. Sampson*, 30 L. T. 262.

(*x*) *Bentley v. Metcalfe*, [1906] 2 K. B. 548, where it was held that such a letting carried with it the obligation that the power should be reasonably fit for the purpose for which it was supplied.

(*y*) *Farewell v. Dickenson*, 6 B. & C. 251; *Newman v. Anderton*, 2 N. R. 224.

(*z*) 2 Black. Comm. 317.

(*a*) *Gardiner v. Williamson*, 2 B. & Ad. 336.

(*b*) *Somerset (Duke of) v. Fogwell*, *supra*.

(*c*) *Bird v. Higginson*, *supra*. Such a lease, it may be mentioned, does not prevent the lessor from cutting timber on the lands in his ordinary management of them, though the effect may be injurious to the shooting: *Gearns v. Baker*, L. R. 10 Ch. 355.

for water (*d*), will be invalid unless under seal. And it is a consequence of this rule that an instrument of demise comprising both corporeal and incorporeal hereditaments at one entire rent will, unless under seal, be invalid as to both (*e*); though it does not follow that, where occupation has been enjoyed under it, it is void altogether (*f*). But if the letting be at a distinct rent for each hereditament, the demises are virtually different, and each is governed by the rules that apply to its class (*g*).

Where, however, in the case of a lease of incorporeal hereditaments invalid for want of seal, though there has been no deed, there has been an actual enjoyment by the lessee of the property intended to be demised, he will be held bound at the end of the term by any covenants in such invalid demise which he may have undertaken then to perform (*h*). And although an agreement to grant a lease of an incorporeal hereditament, being a "contract or sale of an interest concerning lands" within the 4th section of the Statute of Frauds, can be properly made only in writing (*i*)—and if so made can be enforced by an action for damages upon its breach, though the instrument, where not under seal, be ineffectual to pass an interest (*k*)—yet when it has been in part performed by one of the parties to it, specific performance (*l*) will be decreed even though the requirements of the statute have not been satisfied (*m*). It may be considered doubtful, however, whether an instrument purporting to be an actual demise of an incorporeal hereditament, but invalid for want of a seal, would (even where there have been acts of part performance) be held to amount to an effectual lease; but for the reasons already given it is submitted that it would (*n*).

Effect of lease.—Entry of lessee.—The effect of a lease is to vest the term in the lessee, but before entry he cannot sue in trespass (*o*) (possession being always necessary for that action (*p*)),

(*d*) *Hewlins v. Shippam*, 5 B. & C. 221, per Bayley, J.

(*e*) *Gardiner v. Williamson*, *supra*. Cf. *Doe v. Lloyd*, 3 Esp. 78.

(*f*) See *R. v. Hockworthy*, 7 A. & E. 492, per Coleridge, J.; and cf. next paragraph.

(*g*) *Gardiner v. Williamson*, *supra*.

(*h*) *Adams v. Clutterbuck*, 10 Q. B. D. 403; *Thomas v. Fredricks*, 10 Q. B. 775. Cf. a similar result in the case of corporeal hereditaments, *post*, pp. 344-5.

(*i*) See *Webber v. Lee*, 9 Q. B. Div. 315; *post*, p. 354.

(*k*) *Smart v. Jones*, 15 C. B. N. S. 717.

(*l*) As to this, see pp. 345 *et seq.*, *post*.

(*m*) *McManus v. Cooke*, 35 Ch. D. 681.

(*n*) See this matter discussed *supra*, pp. 16, 17; and see further *Radcliff v. Hayes*, [1907] 1 I. R. 101.

(*o*) *Wallis v. Hands*, [1893] 2 Ch. 75, cited *post*, p. 298.

(*p*) *Harrison v. Blackburn*, 17 C. B. N. S. 678.

though he may bring ejectment (*q*): a remedy also open to him if after his entry he be wrongfully dispossessed by the lessor (*r*). The lease itself, however, without entry, gives him an interest in the term (*interesse termini*) (*s*) with a right to complete that interest by possession (*t*): an interest which, though not an estate (*u*), is not a bare right of action arising out of contract, but a right which gives the lessee a cause of action against any person whose act may have prevented his entry or the delivery of possession to him (*v*). But when a tenant already in possession takes a further lease to himself and another person, such possession enures to the benefit of both, and the interest passed by the lease is not a mere *interesse termini* (*x*).

Similarly, a lease "in reversion," *i.e.*, a lease to commence upon the determination of a subsisting lease (*y*), confers also only an *interesse termini* on the lessee while the subsisting lease remains undetermined (*z*), the reversion until the determination of that lease continuing in the lessor (*a*).

Where a reversionary lease of premises then used as a public-house provided that the lessee should use them only for that purpose so long as the necessary licence could be obtained, it was held that there was no warranty that the premises should carry a licence at the time the lease fell into possession, and that the lessee consequently then became liable for the rent agreed upon, though the premises, in consequence of the licence having been lost before that time arrived, had become greatly diminished in value (*b*).

But when a lease is made to take effect in possession of lands which are already in demise—so that the two leases are said to be "concurrent"—the effect is (if such a lease be made by deed) to pass the reversion during the continuance of the previous demise (*c*). If, however, such lease be not under seal, and the term previously granted cover the whole of the term which it purports to convey, it will be altogether void (*d*).

(*q*) Cole, Ejec. 459, citing *Doe v. Day*, 2 Q. B. 147. As to ejectment, see *post*, pp. 765 *et seq.*

(*r*) *Ferel v. Hill*, 15 C. B. 207. As to the tenant's right to use force, see *Williams v. Taperell*, 8 T. L. R. 241.

(*s*) Co. Lit. 46 b.

(*t*) Per Bowen, L. J., in *Gillard v. Cheshire Lines Committee*, *infra*.

(*u*) *Lewis v. Baker*, *infra*, per Eady, J.

(*v*) *Gillard v. Cheshire Lines Committee*, 32 W. R. 913.

(*x*) *Keyse v. Poucell*, 2 E. & B. 132.

(*y*) *Post*, p. 106.

(*z*) *Doe v. Walker*, 5 B. & C. 111; *Joyner v. Weeks*, [1891] 2 Q. B. 31.

(*a*) *Smith v. Day*, 2 M. & W. at pp. 694, 699, per Parke, B.; *Lewis v. Baker*, [1905] 1 Ch. 46.

(*b*) *B'um v. Ansley*, 16 T. L. R. 249.

(*c*) Bac. Ab. Leases (N); *Palmer v. Thorpe*, Cro. Eliz. 152; *Harmer v. Bean*, 3 C. & K. 307; *Wordsley Brewery Co. v. Halford*, 90 L. T. 89.

(*d*) See *Neale v. Mackenzie*, 1 M. & W. 747.

Possession taken by the lessee with the knowledge and consent of the lessor does not in itself amount to a waiver of an objection to title by the former, but is only evidence of his acceptance of the title, which may be rebutted by circumstances showing that it was not intended by the parties to have that effect (*e*).

The fact that the lessee has obtained the lease by means of a fraudulent misrepresentation or concealment (even one made to effect an illegal purpose) does not after entry avoid the lease (*f*), for an estate conveyed cannot be divested by the existence of fraud and unlawful purpose on the part of the grantee (*g*); though it is conceived that it would be a proper ground for rescission of the lease in equity (*h*). Nor may the lessor interfere with the lessee's right of access to the demised premises, on the ground that the lessee contemplates the commission of an unlawful act, even if such act be expressly prohibited by the terms of the lease (*i*).

Formerly, where the lease was not executed by the lessor, the lessee, even though he had entered and occupied during the whole term, was able to evade his liability upon its covenants (except those merely collateral to the interest in the land (*k*)), on the ground that that interest had not been created to which the covenants were annexed, and during which only they could operate (*l*). But where the consideration bargained for had not wholly failed, this was otherwise; so that upon a lease by a tenant for life and a remainderman by which each demised according to his interest to a person who entered into possession, the tenant for life could sue the latter upon the covenants, although the lease had remained unexecuted by the remainderman (*m*).

This doctrine, however, would apparently now no longer hold good, inasmuch as specific performance, as will be explained hereafter, could be obtained of the agreement underlying the unexecuted instrument of demise, and the parties would therefore be in the same position as if the lease had been regularly executed (*n*).

Form of lease.—A somewhat succinct form of lease has been provided by statute. But although this enactment is still

(*e*) *Hyde v. Warden*, 3 Ex. Div. 72.

(*f*) *Feret v. Hill*, 15 C. B. 207.

(*g*) 2 Dart, V. & P. 1015, n. (7th ed.).

(*h*) See *Rhodes v. De Beauvoir*, 6 Bli. N. 8.195; Pollock on Contracts, p. 371, n. 7th ed.; and *post*, p. 341.

(*i*) *Lilley v. Bennett*, 5 T. L. R. 156.

(*k*) See *post*, p. 422.

(*l*) *Pitman v. Wordbury*, 3 Exch. 4 (disapproving *Cooch v. Goodman*, 2 Q. B. 580); *Cardwell v. Lucas*, 2 M. & W. 111.

(*m*) *How v. Greek*, 3 H. & C. 391.

(*n*) See *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608, cited *supra*, p. 15; and cf. *May v. Bellerille*, [1905] 2 Ch. 605, cited *post*, p. 93.

unrepealed (o), such form is seldom, if ever, now resorted to, and it is therefore deemed unnecessary to set it out. The following, however, are the constituent elements of every lease:—Parties, the Demise, the Parcels, the Term (commencement and duration), and the Reddendum or rent-reserving clause, with such Covenants and Conditions as may be agreed upon between the parties.

These matters—to which are added some observations on miscellaneous points connected with leases—will be discussed in their order.

(o) The Act referred to is the stat. 8 & 9 Vict. c. 124.

CHAP. I.—THE LEASE (*continued*).

DIV. I.—PARTIES.

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SECT. 1.—LESSORS.

Subject to the observations which follow, all persons may make leases of their property, and such leases will in general enure as long as, but not longer than, their interest in the subject-matter of the demise continues. Thus, at common law a lease by a tenant for life or a tenant in dower or by the curtesy determines upon his death (*a*) (though not before, as by the tenant for life surrendering or forfeiting his estate (*b*)), so as to be wholly incapable even of confirmation by the remainderman or reversioner (*c*). In the same way, a lease by a person seised of an estate *pur auter vie*, though it may be made to commence after his own death (*d*), is

(a) Bac. Ab. Leases (I. 1, 2).

(b) *Sutton's case*, 12 Mod. 537. The rule as to the determination of sub-interests on the forfeiture of leasehold estates, as will be seen hereafter (*post*, p. 650), is different.

(c) *Jenkins v. Church*, Cowp. 482;

Doe v. Butcher, 1 Doug. 50; *Ludford v. Barber*, 1 T. R. 90; *Smith v. Widlake*, 3 C. P. Div. 10. For an instance of equitable relief in such case after expenditure of money on the premises by the lessee, see *Stiles v. Cowper*, 3 Atk. 692; and see *infra*, p. 35.

(d) *Dale's case*, Cro. Eliz. 182.

good at common law only during the life of the *cestui que vie*, even though the lessor by purchasing the reversion have acquired an estate capable of supporting the lease for the whole term (*e*). In consequence of the above principle of the common law, that leases cannot enure longer than the interest of the persons granting them, it was formerly very common to find in wills and settlements express powers to tenants for life, &c., to grant leases for longer terms (*f*); and where no such powers were given the practice was often adopted for the remainderman or reversioner to join with the tenant for life in making the lease, the instrument operating, during the life of the tenant for life, as his lease and the confirmation of the remainderman or reversioner, and after his death as the lease of the remainderman or reversioner (*g*). For apart from the tenant for life, remaindermen and reversioners, being owners of a present right in future estates, have always the power to make leases; but such leases can of course only take effect in possession on the determination of the estates preceding them (*h*). But this course is seldom now resorted to, nor are the express powers mentioned above so frequently met with, because facilities, by various successive statutes, have now been given enabling persons to make leases which previously they would have been wholly unable to make. At the same time, various restrictions exist, both by statute and at common law, upon the general right of making leases.

These matters are here considered under the following heads:—

Tenants in fee.—A tenant in fee being possessed of the largest estate known to the law can, and always could, make leases without limitation or restraint (*i*). A tenant in fee simple in possession, with an executory limitation, gift, or disposition over, has, under the Settled Land Act, 1882 (*k*), all the leasing powers conferred by that Act upon a tenant for life (*l*).

Tenants in tail.—At common law a lease by a tenant in tail was voidable after his death by the issue in tail (*m*), and absolutely void as between the lessee and the remainderman or

(*e*) Co. Lit. 47 b; Bac. Ab. Leases (I. 2). As to yearly tenancy, however, to remainderman implied from payment of rent, see p. 394, *post*.

(*f*) See as to this, *infra*, p. 34.

(*g*) Co. Lit. 45 a; *Treport's case*, 6 Co. 14 b.

(*h*) 1 Platt on Leases, 51.

(*i*) Com. Dig. Estates (G. 2).

(*k*) 45 & 46 Vict. c. 38, s. 58, sub-s. 2; *In re Morgan*, 24 Ch. D. 114.

(*l*) See *infra*, pp. 28 *et seq*.

(*m*) *Ecc Dce v. Jenkins*, 5 Bing. 469.

reversioner (*n*); and though the statute 32 Hen. 8, c. 28 (*o*), made such a lease (if granted under certain conditions therein laid down) binding after his death upon the issue, it still remained invalid as against the remainderman or reversioner (*p*). The Act for the Abolition of Fines and Recoveries (*q*), however, enabled a tenant in tail to make binding leases of his lands for years or lives: with the concurrence (if a married woman) of her husband, and subject to acknowledgment of the deed by her (*r*). Such leases must be by deed inrolled in Chancery within six months of execution: but without the necessity of inrolment where the term granted does not exceed twenty-one years, where it is to commence within twelve months from the date of the lease, and where the rent reserved is to be one which at the time of granting the lease is a rack-rent or five-sixth parts of a rack-rent (*s*). The Settled Estates Act, 1877 (*t*), subsequently gave to tenants in tail in possession the same leasing powers as by that Act were given to tenants for life (*u*). And the Settled Land Act, 1882 (*x*), expressly provides (*y*) that (amongst others) not only tenants in tail, but also persons entitled to a base fee and tenants in tail after possibility of issue extinct (provided the estate or interest of each of them is in possession), shall have the same powers of leasing (*z*) as a tenant for life under the Act.

Tenants for life.—As already observed, no lease could at common law be made by a tenant for life to enure beyond his death. The Settled Estates Act, 1877 (*a*), consolidating the provisions of earlier Acts now repealed, empowered (*b*) the Chancery Division of the High Court, on application (*c*) by a tenant for life, &c., to authorize leases of settled estates for any purpose whatsoever, whether involving waste or not, subject to a due regard to the interests of all parties entitled under the settlement. For the purposes of the Act a tenant for life is deemed entitled to the possession, to whatsoever extent the estate may be charged or incumbered in his hands (*d*). Every such lease must be made

(*n*) Bac. Ab. Leases (D. 1); *Andrew v. Pearce*, 1 N. R. 158.

(*o*) Now repealed except as to ecclesiastical leases (see *infra*, p. 50): 19 & 20 Vict. c. 120, s. 35.

(*p*) Co. Lit. 45 b.

(*q*) 3 & 4 Will. 4, c. 74.

(*r*) Sect. 40.

(*s*) Sects. 15, 40, 41.

(*t*) 40 & 41 Vict. c. 18.

(*u*) See next paragraph.

(*x*) 45 & 46 Vict. c. 38.

(*y*) Sect. 58, sub-ss. 3 and 7.

(*z*) See *infra*, pp. 28 *et seq.*

(*a*) 40 & 41 Vict. c. 18.

(*b*) Sect. 4.

(*c*) As to who may apply, see sect. 23; and as to the consents necessary and the procedure for obtaining or dispensing with them, see ss. 24—30.

(*d*) Sect. 54.

by deed (of which a counterpart is to be executed by the lessee) (*e*) and must be made to take effect in possession at or within one year next after the making thereof: it must reserve the best rent that can reasonably be obtained, to be made payable half-yearly or oftener, without taking any fine or other benefit in the nature of a fine: and it must contain a condition for re-entry (*f*) on non-payment of the rent for a period not exceeding twenty-eight days after it becomes due. And subject and in addition to the above general conditions, the Court has power to impose such special conditions as it may think fit (*g*). The terms for which such leases may be granted must not exceed twenty-one years for an agricultural or occupation lease, forty years for a mining lease or a lease of water-mills, way-leaves, water-leaves, or other rights or easements, sixty years for a repairing lease, and ninety-nine years for a building lease; and (except in the case of agricultural leases) the Court may, where satisfied that it is the usual custom of the district and likely to prove beneficial to the inheritance, grant leases for even longer terms than those above specified (*h*). But no power of authorizing leases may be exercised by the Court if an express declaration to the contrary (*i*) be contained in the settlement (*j*).

The Act contains further powers (*k*) to tenants for life (including under that designation tenants in dower and by the curtesy), without the necessity of any application to the Court, to grant leases for terms not exceeding twenty-one years, provided these leases be made in conformity with certain conditions therein laid down. These conditions are for the most part analogous to those already set out under sect. 4 (*l*); but it is specifically provided that leases granted under this section (s. 46) must not be made without impeachment of waste,—so that a lease made under it which exempts the lessee from liability for “fair wear and tear (*m*) and damage by tempest,” is void (*n*):—that they shall contain such “usual and proper” covenants (*o*) as the lessor shall think fit,—so that a lease will be void on this ground only when there is such an outrageous omission of covenants as to import fraud (*n*):—and that they shall not comprise the principal

(*e*) See note (*r*), p. 30, *infra*.

(*f*) As to this, see p. 316, *post*.

(*g*) Sect. 5.

(*h*) Sect. 4.

(*i*) *In re Peake's Settled Estates*, [1893]
3 Ch. 430.

(*j*) Sect. 38.

(*k*) Sect. 46.

(*l*) See last paragraph.

(*m*) As to this, see *post*, p. 224.

(*n*) *Davies v. Davies*, 38 Ch. D. 499.

(*o*) Cf. *post*, pp. 383—386.

mansion-house and the demesnes thereof. The covenants there spoken of as required by the statute are binding legal covenants, enforceable against all the lessees from the commencement of the lease (*p*).

The leasing powers conferred by sect. 46 of the Settled Estates Act do not require the existence of trustees; unlike those conferred by the Settled Land Act, 1882 (*q*), for which the existence of trustees is necessary (*r*)—though their non-existence will not invalidate the title of a lessee who has acted in good faith (*s*),—except in the case of leases for a term not exceeding twenty-one years, made not without impeachment of waste, and at the best rent that can be reasonably obtained without fine (*t*). Hence it would seem that where there are no trustees of a settlement (*u*), leases should still be made under the powers of the earlier Act. But the course now pursued in nearly all cases is to make use of the later Act, and to get trustees appointed if necessary (*x*). This may be done on the application—made, like all other applications under the Act, by summons in chambers (*y*)—of the tenant for life or of any other person having under the settlement an estate or interest in possession, remainder or otherwise, or, in the case of an infant, of his guardian or next friend (*z*); but not of the intending lessee (*a*). In fact, except for the single circumstance that the Court has power under certain conditions (*b*) to grant leases of exceptional length under sect. 4 of the Settled Estates Act (the similar power under the Settled Land Act being restricted to building and mining leases (*c*)), that Act is, at the present day, practically superseded by the later Act now to be considered. When, however, powers of leasing have been granted under the Settled Estates Act, the leasing powers under the Settled Land Act cannot be exercised without an order staying or suspending the earlier powers (*d*).

(*p*) *Boyce v. Edbrooke*, [1903] 1 Ch. 836.

(*q*) 45 & 46 Vict. c. 38; *infra*, p. 29.

(*r*) *Wheelwright v. Walker*, 23 Ch. D. 752.

(*s*) *Mogridge v. Clapp*, [1892] 3 Ch. 382; see *infra*, p. 32.

(*t*) 53 & 54 Vict. c. 69, s. 7, sub-s. 2.

(*u*) Within 45 & 46 Vict. c. 38, s. 2, sub-s. 8; 53 & 54 Vict. c. 69, s. 16; or 56 & 57 Vict. c. 53, s. 47.

(*x*) *In re Bentley*, 54 L. J. Ch. 782 (reported as *Wade v. Wilson*, 33 W. R. 610).

(*y*) Settled Land Act Rules, 1882, r. 2.

(*z*) 45 & 46 Vict. c. 38, s. 38. Notice of the application must be served on the trustees (if any), and, when he is not the applicant, on the tenant for life: S. L. Act Rules, r. 4. Also on any other person the Court thinks fit: *id.*, r. 6.

(*a*) *Mogridge v. Clapp*, *supra*, per Kay, L. J.

(*b*) *Supra*, p. 26.

(*c*) 45 & 46 Vict. c. 33, s. 10; *infra*, p. 30.

(*d*) *Re Poole's Settlement*, 50 L. T. 585.

The Settled Land Act, 1882, which applies, it may be observed, equally to all settlements (*e*), whether made before or after the Act came into operation (*f*), confers the same powers of leasing as are thereby given to a tenant for life,—*i.e.*, the person who is for the time being under a settlement beneficially entitled to possession of settled land for his life (*g*), and this irrespective of the fact that the settled land or his interest therein may be incumbered or charged to any extent (*h*)—upon other “limited owners,” provided their estates be in possession (*i*). Such limited owners are enumerated in the Act (*k*), and include—in addition to those already mentioned (*l*)—a tenant for years determinable on life (not holding merely under a lease at a rent (*m*)): a tenant for the life of another (not holding merely under a lease at a rent): a tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life (*n*), or is subject to a trust for accumulation of income (*o*) for payment of debts or other purpose (*p*): a tenant by the curtesy (*q*): and a person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, or until sale or forfeiture (*r*).

The general leasing powers given to the tenant for life may therefore also be exercised by all the foregoing classes of limited owners; and they may, with the consent of the Court (*s*), likewise be exercised by persons entitled for life to the proceeds of sale of land held on trust for sale (*t*). But they may only be exercised with due regard to the interests, *i.e.*, both pecuniary and sentimental (*u*), of all persons entitled under the settlement (*x*); and in considering whether such regard has been paid in a case where want of good faith is alleged, the circumstances under

(*e*) 45 & 46 Vict. c. 38, s. 2, sub-s. 1.
(*f*) January 1st, 1883: sect. 1, sub-s. 2.

(*g*) Sect. 2, sub-s. 5.

(*h*) Sect. 2, sub-s. 7.

(*i*) See sect. 2, sub-s. 10 (*i*). *In re Atkinson*, 31 Ch. Div. 577; *In re Strangways*, 34 Ch. Div. 423.

(*k*) Sect. 58.

(*l*) See pp. 24, 25, *supra*, at notes (*k*) and (*y*).

(*m*) *In re Hus'e's Settled Estates*, 29 Ch. Div. 78.

(*n*) *In re Paget's Settled Estates*, 30 Ch. D. 161; *In re Edwards's Settlement*, [1897] 2 Ch. 412.

(*o*) *Williams v. Jenkins*, [1893] 1 Ch. 700.

(*p*) See *In re Martyn*, 69 L. J. Ch. 733.

(*q*) For the purposes of the Act the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife: 47 & 48 Vict. c. 18, s. 8.

(*r*) *In re Jones*, 26 Ch. Div. 736; *In re Clithero's Estate*, 31 Ch. Div. 135; *In re Horne's Settled Estate*, 39 Ch. Div. 84; *In re Ilanover (Lady)*, [1907] 1 Ch. 635.

(*s*) *In re Daniel's Settled Estates*, [1894] 3 Ch. 503.

(*t*) 45 & 46 Vict. c. 38, s. 63, amended by 47 & 48 Vict. c. 18, s. 7.

(*u*) *In re Marquis of Ailesbury's Settled Estates*, [1892] 1 Ch. 506; affirmed by H. L., *infra*, note (*m*).

(*x*) Sect. 53.

which the lease may have been made, its real objects and effect, and (where the question is only raised after the death of the limited owner) what has been done under it during his life, are all material (*y*). It is the contrast between the benefit to the lessee and the injury to those who are to come after, which constitutes the offence against the Act and brings the case within the provision here in question (*z*). Where for instance part of the settled lands consisted of a public-house, it was held that the tenant for life was not entitled to insist on the insertion of a provision in a renewed lease to the effect that the premises should not be used for the sale of intoxicating liquors,—such a provision having for its necessary result to diminish their value—when the only foundation for such a requirement was a conscientious belief that it was morally beneficial to the interests of the community (*a*). So a tenant for life, entitled to live rent free on the property during her widowhood, was restrained from granting a lease under the Act to her intended second husband, on the ground that her real object was to continue herself in occupation (*b*). Moreover, as the tenant for life, in relation to the exercise of his leasing powers under the Act, is deemed to be in the position of a trustee for the parties entitled under the settlement (*c*), a money payment made by the lessee as a personal benefit to the tenant for life will vitiate the lease, and the Court, in giving relief to the parties entitled under the settlement, will not enter into the question whether they have been damnified or not (*d*).

The powers in question are set forth in sect. 6 of the Act, which provides that the tenant for life may lease (or contract to lease (*e*)) the settled land or any part thereof (*f*), or any easement, right or privilege of any kind over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding ninety-nine years in the case of a building

(*y*) *Sutherland v. Sutherland*, [1893] 3 Ch. 169.

(*z*) Per Kekewich, J., in *Gilbey v. Ru-h*, [1906] 1 Ch. 11, where a lease granted by the tenant for life to his wife was held valid.

(*a*) *In re Somers (Lord)*, 11 T. L. R. 567.

(*b*) *Middlemas v. Stens*, [1901] 1 Ch. 574.

(*c*) Sect. 53.

(*d*) *Chandler v. Bradley*, [1897] 1 Ch. 315.

(*e*) See sect. 31; *Hughes v. Fanagan*, 30 L. R. (I.) 111, cited *infra*, p. 32.

(*f*) A building lease of settled land containing an exception of mines and minerals is a lease of a "part thereof" within the meaning of this clause: *In re Gladstone*, [1900] 2 Ch. 101, overruling *In re Newell*, [1900] 1 Ch. 90 (reported as *In re Nevill*, 69 L. J. Ch. 94). This matter in the case of mining leases is specially dealt with in sect. 17.

lease (*g*), sixty years in the case of a mining lease (*h*), and twenty-one years in the case of any other lease: but not the principal mansion-house (*i*), and the pleasure-grounds and park (*j*) and lands usually occupied therewith (*k*) (or easements over them (*l*)), for a lease of which the consent of the trustees of the settlement or an order of the Court is required (*m*), unless the house is usually occupied as a farm-house, or the site of the house and such pleasure-grounds, park, and lands do not together exceed twenty-five acres in extent (*n*). Where the consent of the trustees is necessary, it must be a consent given at the time and a consent *ad hoc*, with reference to the particular transaction; but it need not be in writing, nor need it be communicated to the lessor or to the lessee (*o*). And so long as the consent is honestly and properly given to the demise of what was in fact demised, it is immaterial that the trustees may have thought that (owing, for example, to the premises not really comprising the principal mansion-house) such consent was not in truth necessary (*o*).

Every lease (except in the case of an agreement in writing not made without impeachment of waste, where the term does not extend beyond three years from its date and where the best rent is reserved without fine (*p*)) must be by deed (*q*)—of which a counterpart is to be executed by the lessee (*r*) and delivered to the

(*g*) Such lease may contain an option of purchase (as to which see *post*, p. 312): see 52 & 53 Vict. c. 36, and for further regulations as to building leases, see 45 & 46 Vict. c. 38, ss. 8, 10; *In re Chawner's Settled Estates*, *infra*; *In re Daniell's Settled Estates*, *supra*. See, also, as to approval of lease by Court, S. L. Act Rules, r. 9.

(*h*) The rent reserved by such lease may be made to vary according to the price of the minerals gotten: 53 & 54 Vict. c. 69, s. 8; and for further regulations as to mining leases, see 45 & 46 Vict. c. 38, ss. 9—11; *In re Rids*, 31 Ch. Div. 504; *In re Kemys-Tynte*, [1892] 2 Ch. 211; *In re Chaytor*, [1900] 2 Ch. 804; *In re Aldam's Settled Estate*, [1902] 2 Ch. 46; *Sitwell v. Lonsborough*, [1905] 1 Ch. 460. See also, as to approval of lease by Court, S. L. Act Rules, r. 9.

(*i*) It seems probable that there may be more than one "principal mansion-house" on land settled to the same uses by one and the same instrument: per Kekewich, J., *Gilbey v. Rush*, [1906] 1 Ch. 11.

(*j*) This word is not to be construed in its legal or technical sense, but according to its ordinary and natural meaning in common parlance: *Pease v. Courtney*, [1904] 2 Ch. 503.

(*k*) The words "usually occupied therewith" qualify the word "lands" only: *Pease v. Courtney*, *supra*.

(*l*) *Sutherland v. Sutherland*, *supra*; *Pease v. Courtney*, *supra*.

(*m*) 53 & 54 Vict. c. 69, s. 10, sub-s. 2 (replacing 45 & 46 Vict. c. 38, s. 15); *In re Brown's Will*, 27 Ch. D. 179; *In re Sebright's Settled Estates*, 33 Ch. Div. 429; *Bruce v. Ailesbury (Lord)*, [1892] A. C. 356. Notice of application to the Court must be served on the trustees: see S. L. Act Rules, r. 4. As to approval of lease by Court, see r. 9.

(*n*) 53 & 54 Vict. c. 69, s. 10, sub-s. 3.

(*o*) *Gilbey v. Rush*, *supra*.

(*p*) 53 & 54 Vict. c. 69, s. 7, sub-s. 3.

(*q*) 45 & 46 Vict. c. 38, s. 7.

(*r*) Not necessarily, as it would appear, at the time the lease itself is executed: see *Fryer v. Coombs*, 11 A. & E. 403.

tenant for life—to take effect in possession (s) not later than twelve months after its date. Such lease must also (t) reserve the best rent (u) that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case. The fine, however, in question must be a sum paid in good faith as a fine, and not a mere payment, intended to be applied by the tenant for life to his own use, and made as an inducement to him to execute the lease (v). The fine must moreover be one taken on the occasion of the transaction of granting the lease, the money “laid out” must be laid out with reference to the granting of the lease—and consequently will not include past voluntary expenditure by a lessee on property included in the lease,—and the money “to be laid out” must be under an obligation imposed, by the transaction of lease, on the tenant (w). (But in the case of holdings to which the Agricultural Holdings Act (x) applies (y), it is not necessary to take into account against the tenant the increase in the value of such holding arising from any improvements thereon made or paid for by him (z); and in the case of a lease to a county council for the purposes of the Small Holdings Act (a) it is specially provided (b) that it may be made at such a rent as, having regard to the said purposes and to all the circumstances of the case, is the best that can be reasonably obtained.) Such lease must further (c) contain a covenant by the lessee (d) for payment of the rent, and a condition of re-entry (e) on the rent not being paid within a time therein specified not exceeding thirty days. Although there is no

(s) A lease containing a covenant for renewal (as to which see *post*, p. 306) is consequently excluded: see *In re Farnell's Settled Estates*, 33 Ch. D. 599, decided under a similar clause of the Settled Estates Act.

(t) 45 & 46 Vict. c. 38, s. 7.

(u) See *Sutherland v. Sutherland*, [1893] 3 Ch. 169, at p. 195; *Easton v. Penny*, 67 L. T. 290; *Chandler v. Bradley*, *infra*; *In re Handman*, [1902] 1 Ch. 599.

(v) *Chandler v. Bradley*, [1897] 1 Ch. 315, where it was held that such a payment rendered the lease void (see p. 29, *supra*), and that the lessee's liability was not limited to paying the sum over again to the trustees.

(w) *In re Chawner's Settled Estates*, [1892] 2 Ch. 192.

(x) 46 & 47 Vict. c. 61.

(y) See ss. 54, 61; *post*, p. 728.

(z) Sect. 43. And for another exception in leases of land made for the purpose of erecting dwellings for the working classes, see 53 & 54 Vict. c. 70, s. 74, amended (in effect) by 53 & 54 Vict. c. 69, s. 18; *In re Calverley's Settled Estates*, [1904] 1 Ch. 150.

(a) 55 & 56 Vict. c. 31; *infra*, pp. 55, 73.

(b) Sect. 12.

(c) 45 & 46 Vict. c. 38, s. 7.

(d) As to the nature of the covenants required in statutory leases, see p. 27, *supra*, and as to the right of the trustees to sue thereon in leases granted by tenants for life, see *post*, p. 139.

(e) But this cannot apply to leases of incorporeal hereditaments: *Sitwell v. Londesborough*, [1905] 1 Ch. 460. As to conditions of re-entry, see *post*, p. 316.

express enactment to that effect, a lease in contravention of these provisions would probably be void (*f*); but a lessee, dealing in good faith (*i.e.*, in the belief that all is being regularly and properly done (*g*)) with the tenant for life, is, as against all parties entitled under the settlement, to be taken to have complied with them (*h*). And where a lease granted by a tenant for life on the footing of absolute ownership and without reference to the Act in effect complies with it, it will have a valid operation as a lease under the powers of the Act (*i*).

A mortgagor's notice of intention to make the lease must be given by registered letter to the trustees of the settlement—whose number at the date of the notice must be not less than two, unless a contrary intention is expressed in the settlement,—and to their solicitor if known to the tenant for life (*k*). But a person dealing with the latter in good faith is not to be concerned to inquire if it has been given (*l*); and as the existence of trustees is not a question of title, the lessee will not, where there were none at the date of the lease, be held to have had constructive notice (*m*) of that fact (*n*). Where, however, he has actual knowledge that there are no trustees, and consequently that the requirements of the section have not been complied with, the lease or agreement (*o*) will, as it seems, be invalid (*p*). Notice of a general intention is sufficient, and in the case of a lease for a term not exceeding twenty-one years, reserving the best rent without fine, and not made without impeachment of waste, no notice is necessary at all (*q*). Moreover, any trustee, by writing under his hand, may waive notice either in any particular case or generally, and may accept less than one month's notice (*r*).

This leasing power of a tenant for life, &c., is not capable of assignment, and does not on his bankruptcy pass to his trustee (*s*). It extends, however, to the making of (1) a lease for giving effect to a contract entered into by any of his predecessors in title for making a lease which, if made by the

(*f*) Per Kay, L. J., *Mogridge v. Clapp*, *infra*. And see the point discussed but not decided in *re Handman*, [1902] 1 Ch. 599.

(*g*) *Mogridge v. Clapp*, *infra*; *Sutherland v. Sutherland*, [1893] 3 Ch. 169; *Chandler v. Bradley*, [1897] 1 Ch. 315.

(*h*) 45 & 46 Vict. c. 38, s. 54.

(*i*) *Mogridge v. Clapp*, [1892] 3 Ch. 382.

(*k*) Sect. 45; *Easton v. Penny*, 67 L. T. 290.

(*l*) Sect. 45.

(*m*) See p. 426, *post*.

(*n*) *Mogridge v. Clapp*, *supra*.

(*o*) See sect. 45, *ad fin*.

(*p*) *Hughes v. Fanagan*, 30 L. R. (1.) 111.

(*q*) 53 & 54 Vict. c. 69, s. 7, sub-s. 1.

(*r*) 47 & 48 Vict. c. 18, s. 5.

(*s*) 45 & 46 Vict. c. 38, s. 50. See *In re Mansel's Settled Estates*, W. N. 1884, p. 209.

predecessor, would have been binding on the successors in title; (2) a lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land; (3) a lease for confirming, as far as may be, a previous lease being void or voidable: but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted under the Act or otherwise, as the case may require (*t*). The leasing powers given by the Act are cumulative, and nothing contained in it is to abridge or affect any other powers given by the settlement or by any other statute (*u*) (though, in case of conflict between the provisions of a settlement and those of the Act relating to such powers, the provisions of the latter are to prevail (*x*)), or to preclude a settlor from conferring on the tenant for life any powers larger than those conferred by the Act (*y*). And, on the other hand, any prohibition or limitation, contained in a settlement, of the exercise of powers given by the Act is wholly void (*z*).

Provision is also made for the granting, by tenants for life, &c., of new leases and contracts for leases upon the surrender of existing ones (*a*). Every such new lease must be in conformity with the Act (*b*), and must therefore in general (*c*) be one to take effect in possession. But, by the operation of a statute hereafter referred to (*d*), the fact that the lessee who surrenders has granted an underlease, and that such underlease is still unexpired, does not prevent the new lease from taking effect in possession (*e*).

Trustees of settled estates.—At common law (apart from any express powers given to him in that behalf) a trustee of lands, being the owner of the legal interest, may grant leases, which cannot be impeached so long as they are justified by the quantity of his estate (*f*). But a person taking a lease from a trustee, with notice of the trust (*g*), and without the concurrence of the *cestui que trust*, has always been held subject to the control of equity (*h*). No general rule, however, governing the exercise of that control can be stated, except that the trustee may do what

(*t*) 45 & 46 Vict. c. 38, s. 12.

(*u*) Sect. 56, sub-s. 1. *In re Duke of Newcastle's Estates*, 24 Ch. D. 129.

(*x*) Sect. 56, sub-s. 2. See *Lonsdale (Lord) v. Louthar*, [1900] 2 Ch. 687 (reported as *Lonsdale (Lord) v. Craveford*, 69 L. J. Ch. 686).

(*y*) Sect. 57.

(*z*) Sect. 51.

(*a*) Sects. 13 (3), 31.

(*b*) Sect. 13 (6).

(*c*) *Supra*, p. 31.

(*d*) 4 Geo. 2, c. 28, s. 6; *post*, p. 648.

(*e*) See *In re Ford's Settled Estate*, L. R. 8 Eq. 309.

(*f*) 1 Platt on Leases, 345.

(*g*) *Malpas v. Ackland*, 3 Russ. 273.

(*h*) 1 Platt, *ubi sup*.

is "reasonable" (*i*), the burden of proving the reasonableness of the term granted always devolving on him, and on the lessee claiming under him (*k*). Hence it is, as a rule, advisable, before taking a lease from a trustee, to obtain either the concurrence of the *cestui que trust* or the sanction of the Court (*l*). It would seem that (except, perhaps, under special circumstances) trustees of different but adjoining estates held upon distinct trusts cannot grant a lease of them by a single demise (*m*).

By the Settled Estates Act, 1877, the power to authorize leases conferred on the Court by that Act (*n*) may be exercised by ordering that powers of leasing, in conformity with the provisions of the Act, shall be vested in trustees (*o*). But under the Settled Land Act, 1882, as has already been seen, the large powers of leasing given by that Act are vested not in the trustees of the settlement but in the tenant for life himself; so that now trustees will not often have to resort to the Court for leasing purposes.

Where powers of leasing are expressly given by deed or will to trustees, they are committed to them by reason of personal confidence in their discretion; consequently, where lands were devised to trustees who disclaimed the trusts, it was held that the leasing powers which had been granted to them could not be exercised by the heir-at-law although he took subject to the trusts of the will (*p*).

Persons acting under powers (*q*).—It has already been mentioned (*r*) that even at the present day (though less so than formerly) express powers of leasing given to tenants for life, trustees, &c., in deeds of settlement are not unknown; and that, where such powers exist, they are in addition to, and not in substitution of, those conferred by the Settled Land Act (*s*). They cannot, however, now be exercised without the consent of the tenant for life (*t*).

(*i*) Hence decisions occasionally conflicting: see *In re Shaw's Trusts*, L. R. 12 Eq. 124.

(*k*) *Att.-Gen. v. Owen*, 10 Ves. 555 (a lease of charity lands, but the same principle applies: *infra*, p. 49).

(*l*) 1 Platt, 347.

(*m*) *Tolson v. Sheard*, 5 Ch. Div. 19.

(*n*) Sect. 4; *supra*, p. 25.

(*o*) Sect. 10. As to the effect of such an order, see sect. 13; *In re Houghton's Estates*, W. N. 1894, p. 20.

(*p*) *Robson v. Flight*, 4 D. J. & S. 608.

(*q*) For a full treatment of this subject (which does not fall within the scope of the present work), see Sugden on Powers, Chap. 18; Farwell on Powers (2nd ed.), Chap. 17.

(*r*) *Supra*, p. 24.

(*s*) *Supra*, p. 33.

(*t*) 45 & 46 Vict. c. 38, s. 56, sub-s. 2. *In re Duke of Newcastle's Estates*, 24 Ch. D. 129.

Where a power to grant leases is given by a settlement, its terms must be strictly followed (*u*), and any limitations attached to its exercise carefully observed (*v*) (though a lease may always be granted for a less term than that authorized by the power (*x*)); otherwise the lease, though good as against the grantor himself by estoppel (*y*), will be void as against remaindermen and reversioners (*z*), and even incapable of being confirmed by them (*a*). But though there can be no confirmation of an instrument not voidable but wholly void (*b*), the acts of the remainderman may operate as a new grant (*c*); and in conformity with this principle such a lease has been held enforceable against him in equity, where with knowledge he has permitted expenditure to be incurred upon the premises by the lessee (*d*). In this, as in other cases, the intention of the parties to be gathered from the instrument governs the construction (*e*); but it may be stated, as a general rule, that such limitations are construed strictly against the tenant for life, and liberally for the remainderman (*f*). Thus, for instance, a general power of leasing, without expressing that the leases shall be in possession and not in reversion, is deemed to authorize leases of the former kind only (*g*). But a power to trustees of a will to grant leases to any "person or persons" they should think fit has been held to authorize a lease to a limited company (*h*). Where a general and unrestricted power was conferred upon trustees of leasing "any portion" of a settled estate, it was held that they might grant mining leases even though there had been no open workings of mines on any part of the estate (*i*). Leases under powers are

(*u*) See, e.g., *Goodtitle v. Fenucan*, 2 Doug. 565; *Doe v. Calvert*, 2 East, 376; *Smith v. Jersey (Lord)*, 3 Bli. 290; *Doe v. Rendle*, 3 M. & S. 99; *Doe v. Stephens*, 6 Q. B. 208; *Doe v. Burrough*, *id.*, 229; *Rutland v. Wythe*, 10 Cl. & F. 419; *Dayrell v. Hoare*, 12 A. & E. 356; *Sheehy v. Muskerry (Lord)*, 1 H. L. C. 576; *Doe v. Ferrand*, 20 L. J. C. P. 202; *Truscott v. Diamond Rock Co.*, 20 Ch. Div. 251.

(*v*) *Taylor v. Horde*, 1 Burr. 60; 2 Sm. L. C. 575.

(*z*) *Isherwood v. Oldknow*, 3 M. & S. 382; *Easton v. Pratt*, 2 H. & C. 676 (case of a "repairing" lease); *Edwards v. Millbank*, 4 Drew. 606 (case of a lease for period authorized, with option for lessee to determine earlier).

(*y*) See post, p. 473; *Yellowly v. Gower*, 11 Exch. at p. 294.

(*a*) *Doe v. Cavan*, 5 T. R. 567.

(*b*) *Doe v. Watts*, 7 T. R. 83.

(*b*) Co. Lit. 295 b; *Boues v. East London Waterworks Co.*, Jac. 324, per Lord Eldon, L. C.

(*c*) See *Doe v. Butcher*, 1 Doug. 50. It seems clear that mere acceptance of rent (apart from what is stated *infra*, p. 86) is insufficient for this purpose: *Farwell*, p. 357.

(*d*) *Stiles v. Cowper*, 3 Atk. 692.

(*e*) *Pomery v. Partington*, 3 T. R. 665; *Vivian v. Jegon*, L. R. 3 H. L. 285; *Mortyn v. Lancaster*, 23 Ch. Div. 583, per Fry, L. J.

(*f*) *Orby v. Mohun (Lord)*, Gilb. Eq. Rep. 45, per Lord Cowper, L. C., at p. 58.

(*g*) *Sussex (Lady) v. Wroth*, Cro. Eliz. 5; *Shecomb v. Hawkins*, Cro. Jac. 318.

(*h*) *In re Jeffcock's Trusts*, 51 L. J. Ch. 507.

(*i*) *Re Barker*, 88 L. T. 685.

often required to be made subject to the condition of not being without impeachment of waste; but a lease under such requirement which only sanctions acts in effect authorized by the terms of the power cannot be impeached as an invalid exercise of the power (*k*). The donee of a power of leasing cannot lease to himself, either alone or jointly with others; and it seems probable that he cannot do it even with the intervention of a trustee (*l*).

Relief against defects in leases under powers is now given in certain cases by statute (*m*), it having been provided that leases which are made *bonâ fide* under a power, but which, owing to a deviation, through mistake or inadvertence (*n*), from the terms of the power, are invalid, shall, where the lessee has entered thereunder, be deemed contracts in equity for such leases as might have been granted under the power (*o*); and that where, upon or before the acceptance of rent under any such invalid lease, any receipt or memorandum or note in writing confirming the lease is signed by the person accepting it, such acceptance shall, as against him, be deemed a confirmation of the lease (*p*). But the former Act, which applies only to formal defects in leasing powers and not to matters of substance (*q*), does not operate to allow a lease which is invalid under a power to be turned into a contract for the grant of a valid lease of a class substantially differing, though only by omission (*r*), from that which it was originally intended to be (*s*); nor does it extend to cases where the lease is invalid from its having been executed by a mere stranger to the power, as by the executors of a surviving trustee instead of his heir (*t*).

Tenants for years.—A tenant for years may, unless restricted by the terms of his holding, make a lease—called in this case an underlease—of all or any part of the premises demised to him, so long as it be for a term less (even if only by one day) than his

(*k*) *Morris v. Rhydydefed Colliery Co.*, 3 H. & N. 885.

(*l*) *Boyce v. Edbrooke*, [1903] 1 Ch. 836.

(*m*) As to aiding the defective execution of powers in equity, see notes to *Tollet v. Tollet*, 2 Wh. & Tud. L. C. 289 (7th ed.).

(*n*) *Sutherland v. Sutherland*, [1893] 3 Ch. 169; *Brown v. Peto*, [1900] 1 Q. B. 346 (reported as *Browne v. Peto*, 69 L. J. Q. B. 141); *affd.*, [1900] 2 Q. B. 653.

(*o*) 12 & 13 Vict. c. 26, s. 2. Leases by

ecclesiastical corporations, and leases of the possessions of any college, hospital, or charitable foundation are excepted: s. 7.

(*p*) 13 & 14 Vict. c. 17, s. 2.

(*q*) *In re Newell*, [1900] 1 Ch. 90 (reported as *In re Nevill*, 69 L. J. Ch. 94). The case, as already stated (*supra*, p. 29), has been overruled on another ground.

(*r*) *Sutherland v. Sutherland*, *supra*.

(*s*) *Hallett to Martin*, 24 Ch. D. 624.

(*t*) *Ex parte Cooper*, 2 Dr. & Sm. 312.

own (*u*). So a tenant from year to year, who, as has already been seen, has a greater interest than a tenancy for a year certain (*x*), may make an underlease from year to year (*y*), or even for a term of years (*z*), and still retain a reversion in himself (*a*); but such underlease will operate only during the legal continuance of his own demise (*b*). Where, however, a tenant for years underlet from year to year, and, on the expiration of his own term, entered into an agreement with the landlord for a tenancy of the premises from month to month, it was held that the underlease from year to year was unaffected (*c*). In the same way tenants for less than years (as for one year, or any fixed portion of it) may also sub-let; in fact, all tenants, unless expressly restrained from doing so, have the general power of sub-letting, except tenants at will and tenants at sufferance (*d*); and even they, in accordance with a principle hereafter explained (*e*), may make leases which will be good as between themselves and their lessees by estoppel.

Joint tenants and Tenants in common.—Joint tenants have but a single freehold, and they may therefore always join in making a demise of it, they then forming together but one lessor (*f*). Such a joint demise operates both as a demise by each joint tenant of his own share and by all of the whole (*g*), and is consequently not determined by the death of any of them, the lessee thereupon simply becoming tenant to the survivors or survivor, who will become entitled to the whole rent (*h*). But though there is but one freehold, and each joint tenant is seised of the whole (“*per tout*” as well as “*per my*”), yet for leasing purposes each of them has an *exclusive* right only to his own share; consequently, if one of them purport singly to demise the whole, nothing more than his own share will pass (*i*). It follows, also, that joint tenants may, if they please, sever in leasing, and each may demise his own share to a stranger (*k*), or to the other or others (*l*); and if one of them demise his share and afterwards die, the survivors or

(*u*) *Ante*, p. 6.

(*x*) *Ante*, p. 3.

(*y*) *Pike v. Eyre*, 9 B. & C. 909.

(*z*) *Mackay v. Mackreth*, 4 Doug. 213.

(*a*) *Curtis v. Wheeler*, Mon. & M. 493;
Ozley v. James, 13 M. & W. 209.

(*b*) *Pike v. Eyre*, *supra*, where it is explained how such continuance is unaffected by a surrender.

(*c*) *Peirse v. Sharr*, 2 M. & Ry. 418.

(*d*) *Cole*, Ejec. 449, 456. See *ante*, p. 2. and *post*, p. 597.

(*e*) *Post*, p. 478.

(*f*) *Com. Dig. Estates* (G. 6).

(*g*) *Doe v. Summerson*, 1 B. & Ad. 135, per Lord Tenterden, C. J.

(*h*) *Id.*; *Henstead's case*, 5 Co. 10 a.

(*i*) *Co. Lit.* 186 a.

(*k*) *Bac. Ab. Leases* (I. 5).

(*l*) *Cowper v. Fletcher*, 6 B. & S. 464.

survivor will be bound by the lease, even though it be only made to commence after the lessor's death (*m*).

Tenants in common have unity of possession but not of title (*n*). Unlike joint tenants, they have not one but several freeholds; hence a tenant in common may always, by a separate demise, lease his share—but his share only (*o*)—either to a stranger (*p*) or to his co-tenant (*q*). Tenants in common may also join together in leasing (*r*), but a lease so made, although invalid as a joint demise of the whole (*s*) (inasmuch as their estates are several and distinct (*t*)), operates as a separate demise by each tenant in common of his undivided share, and a confirmation by each of his companions (*u*). Coparceners, it may be mentioned, stand for leasing purposes on the same footing as tenants in common (*x*), except that as they together constitute but one heir (*y*) they cannot sue separately for their individual shares of the rent (*z*).

In general, where two or more persons are entitled to a limited estate as tenants in common or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for the purposes of the Settled Land Act, 1882 (*a*), and can exercise the powers given to a tenant for life by that Act (*b*).

Copyholders and Lords of manors.—The leasing power of a copyholder depends entirely on the custom of the manor to which his tenement belongs; but by general custom he is entitled to make a lease for one year (*c*), and with the licence of the lord he may always make a lease in excess of the custom, for the custom is then superseded (*d*). To do this, however, in the absence of such licence entails a forfeiture of the holding (*e*), whether the lease be made by deed or by parol, and whether it be a lease in

(*m*) Litt. s. 289; *Whitlock v. Horton*, Cro. Jac. 91.

(*n*) 2 Black. Comm. 191.

(*o*) *Jacobs v. Seward*, L. R. 5 H. L. 464.

(*p*) Co. Lit. 199 a.

(*q*) *Leigh v. Dickeson*, 15 Q. B. Div. 60.

(*r*) *Powis v. Smith*, 5 B. & A. 850; *Wallace v. McLaren*, 1 M. & Ry. 516.

(*s*) *Manilla v. Wollington*, Cro. Jac. 169; *Burne v. Cambridge*, 1 Moo. & R. 539.

(*t*) *Heatherley v. Weston*, 2 Wils. 232.

(*u*) *Thompson v. Hakewill*, 19 C. B. N. S. 713, per Byles, J.

(*x*) *Milliner v. Robinson*, Moore, 682.

(*y*) Co. Lit. 163 b.

(*z*) *Decharms v. Horwood*, 10 Bing. 526.

(*a*) 45 & 46 Vict. c. 38, s. 2, sub-s. 6. See *Cooper v. Beley*, [1899] 1 Ch. 639.

(*b*) *Supra*, pp. 28 et seq.

(*c*) *Melwich v. Luter*, 4 Co. 26 a Com. Dig. Copyhold (K. 3).

(*d*) Scriven on Copyholds, p. 223 (7th ed.); *Kensy v. Richardson*, Cro. Eliz. 728.

(*e*) *Cole*, Ejec. 615; *Jackman v. Hodgeson*, Cro. Eliz. 351.

possession or to commence *in futuro* (*f*); and on this question it is the real effect of the instrument which must be regarded (*g*). But a valid agreement may be made to grant a lease for such a term subject to the licence of the lord being obtained (*h*); and so long as the estate actually granted by the lease be within the period warranted by the custom, a mere covenant (*i*) that the land shall be held for a longer period will not entail a forfeiture (*k*). Though a lease of copyholds, by reason of infringement of the custom, be invalid as against the lord, it is nevertheless good both as between the parties and as against all other persons except him (*l*); and even as against the lord the making of such a lease is only a ground of forfeiture which he may waive (*m*), any act on his part whereby the tenant is recognised as such after the forfeiture has accrued to the knowledge of the lord (*n*) (*e.g.*, acceptance of subsequent rent) operating for this purpose as a waiver (*o*). Nor can any one avail himself of the forfeiture except the actual lord at the time it is incurred: a subsequent reversioner or remainderman cannot do so (*p*).

The terms of the licence must always be strictly followed (*q*); but a demise for a less term than that authorized by the licence would be good (*r*). The granting or refusal of a licence is a matter entirely in the lord's discretion (*s*). On the other hand, a licence being a mere dispensation of forfeiture, the lord cannot license upon condition, and should he do so the condition will be void (*t*); but this only applies to conditions subsequent, for a licence on a condition precedent is valid, there being in this case no licence till the condition is performed (*u*). The licence operates as a confirmation of the lease by the lord (*x*); hence, if a tenant make a lease upon licence and afterwards commit a forfeiture, the lord cannot avoid the term as against the lessee (*y*). A lease made by a copyholder with the licence of the lord is determined by the cesser of the latter's estate (*z*): *e.g.*, where he is tenant for

(*f*) *East v. Harding*, Cro. Eliz. 498; Com. Dig. Copyhold (K. 3).

(*g*) *Lutterel v. Weston*, Cro. Jac. 308; *Mathews v. Whetton*, Cro. Car. 233.

(*h*) See *Pistor v. Cater*, 9 M. & W. 315; *Doe v. Clare*, 2 T. R. 739; *Price v. Birch*, 4 M. & Gr. 1.

(*i*) *Fenny v. Child*, 2 M. & S. 255.

(*k*) *Lady Montague's case*, Cro. Jac. 301.

(*l*) *Doe v. Tresidder*, 1 Q. B. 416.

(*m*) *Doe v. Bousfield*, 6 Q. B. 492.

(*n*) Scriv. Cop. 228. Cf. *post*, p. 651.

(*o*) *Cole*, Ejec. 615.

(*p*) *Lady Montague's case*, *supra*.

(*q*) *Jackson v. Neal*, Cro. Eliz. 395.

(*r*) *Goodwin v. Longhurst*, Cro. Eliz. 535; *Worledge v. Benbury*, Cro. Jac. 436.

(*s*) *R. v. Hale*, 9 A. & E. 339.

(*t*) *Haddon v. Arrowsmith*, *infra*.

(*u*) Com. Dig. Copyhold (K. 3).

(*x*) *Turner v. Hodges*, Hutt. 101.

(*y*) *Clarke v. Arden*, 16 C. B. 227.

(*z*) 1 Ro. Ab. 511 K.; *Pelty v. Evans*, 2 Brown. & G. 40.

life, by his death. A lease by a copyholder for life also determines by his own death (*a*).

Lords of manors, as well as their tenants, are fettered, with regard to their power to grant leases, by the customs of the manors which they hold; and if such customs be not strictly obeyed the leases will be invalid as against their successors (*b*). If the custom permit, the lord may grant leases out of the wastes of his manor (*c*); but a custom to grant such leases without any restriction has been held bad, since its effect would be to annihilate rights of common (*d*).

The Settled Estates Act, 1877 (40 & 41 Vict. c. 18), now provides (*e*), that all the leasing powers given by that Act are to include powers to the lords of settled manors to give licences to their copyhold or customary tenants to grant leases of their lands, to the same extent and for the same purposes as leases of freeholds can be granted under the Act (*f*); but nothing is to authorize the granting of any such lease not warranted by the custom of the manor without the consent of the lord (*g*). And by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 14, tenants for life of a settled manor may grant to their copyhold or customary tenants licence to make any such leases of land held by them, or of a specified part of it, as tenants for life are empowered by the Act to make of freehold land (*h*).

Infants and their Guardians.—An infant may make a valid lease of his lands, but such lease is in all cases voidable by him (but not by the other party (*i*)) when he comes of age (*k*), though not before (*l*),—a reasonable time being allowed him for the purpose (*m*)—or, if he should die under age, by his representative (*n*); and this probably whether the lease be beneficial to him or not (*o*). To avoid a lease by an infant, under which

(*a*) *Haddon v. Arrowsmith*, Cro. Eliz. 461.

(*b*) *Cole, Ejec.* 632; *Scriv. Cop.* 24. See *Doe v. Strickland*, 2 Q. B. 792.

(*c*) See *Northwick (Lord) v. Stanway*, 3 B. & P. 346; *Luscelles v. Onslow (Lord)*, 2 Q. B. D. 433.

(*d*) *Badger v. Ford*, 3 B. & A. 153. A power is also given to lords of manors by stat. 13 Geo. 3, c. 81, s. 15, to make leases under certain conditions of portions of the wastes.

(*e*) Sect. 9.

(*f*) See *supra*, pp. 25—27.

(*g*) Sect. 56; *Easton v. Penny*, 67 L. T. 290.

(*h*) See *supra*, pp. 28 *et seq.*

(*i*) *Zouch v. Parsons*, 3 Burr. at p. 1806.

(*k*) *S'ator v. Brady*, 14 Ir. Com. L. Rep. 61.

(*l*) *S'ator v. Trimble*, 14 Ir. Com. L. Rep. 342.

(*m*) See *Doe v. Smith*, 2 T. R. 436; and cf. *post*, p. 66.

(*n*) 1 Platt on Leases, 32.

(*o*) *S'ator v. Trimble*, *supra*, dissenting from *Maddon v. White*, 2 T. R. 159. See *Martin v. Gale*, 4 Ch. D. at p. 431, per Jessel, M. R.

the lessee is in possession, upon the lessor attaining twenty-one years of age, some act of notoriety, such as ejectment, entry, or demand of possession, is requisite: the execution of a second lease to another person is not of itself sufficient to divest the estate created by the first (*p*). Hence, if no such act be done, the lease remains valid and binding (*q*); nor is "ratification" of any sort necessary. (The earlier authorities which laid down that slight acts of confirmation were sufficient, and therefore, presumably, also necessary, when the lease was for the infant's benefit, were apparently decided at a time when the doctrine that an infant's lease is valid unless disaffirmed had not yet been fully recognised.) It seems therefore to follow, that whether the Infants' Relief Act, 1874 (*r*), which prevents any ratification made after full age of any *promise or contract* made during infancy (*s*), applies or not to prevent an action from being brought against an infant, after he attains full age, upon a ratification of a lease made by him during his minority,—and it is possible, in the wide construction given to its terms (*t*), that such is its effect,—yet an action against him under the above circumstances would always lie upon the lease itself. A lease by an infant, in order to be valid as against him, must be his own personal act: a lease made by an agent on his behalf does not bind him, and (even before the statute) was incapable of confirmation (*u*).

As regards *guardians*, their leasing power varies according to the class to which they belong (*x*). A guardian at common law (generally called a "guardian in socage") could always demise the infant's lands (*y*),—but only until the infant attained the age of fourteen (*z*)—since he possessed (as it was said) not merely a bare authority, but an interest in them (*a*); and so could a testamentary guardian (*b*), and a guardian by election (*c*), and an administrator *durante minore etate* (*d*): but not guardians by nature (*e*), or guardians

(*p*) *Slator v. Brady*, *supra*.

(*q*) See *Smith v. Low*, 1 Atk. 489, where a lease was unsuccessfully impeached after acceptance of rent under it for several years subsequent to the time when the lessors attained their majority.

(*r*) 37 & 38 Vict. c. 62.

(*s*) Sect. 2.

(*t*) See *Cozhead v. Mullis*, 3 C. P. D. 439.

(*u*) *Doe v. Roberts*, 16 M. & W. at p. 781, per Parke, B.

(*x*) See these various classes set out and defined, 1 Black. Comm. pp. 461, 462.

(*y*) *R. v. Sutton*, 3 A. & E. 597, per Lord Denman, C. J., at p. 613.

(*z*) *Bac. Ab. Leases* (l. 9).

(*a*) *R. v. Oakley*, 10 East, 491, per Lord Ellenborough, C. J.

(*b*) 1 Platt on Leases, 378.

(*c*) *Id.*, 379.

(*d*) *Finch's case*, 6 Co. 63 a; 38 Geo. 3, c. 87, ss. 6, 7; 1 Wms. Executors, 386 (10th ed.).

(*e*) 1 Platt on Leases, 371.

for nurture (*f*), to whom only the care of the infant's person is committed. Guardians appointed by the Court of Chancery (*g*) (now the Chancery Division of the High Court) may grant leases (like receivers (*h*)) only with the sanction of the Court (*i*). Leases made by guardians should not exceed the duration of the ward's minority, as he can avoid them on coming of age (*k*). The above distinctions, however, in consequence of modern statutory enactments, have now lost most of their importance.

By the Settled Land Act, 1882 (*l*), it is provided (*m*) that when a person who is in his own right seised of, or entitled in possession to, land is an infant, then for the purpose of the Act the land is settled land, and he is deemed tenant for life thereof: and further (*n*), that where a tenant for life, or a person having the powers of a tenant for life under the Act, is an infant, the powers of a tenant for life under the Act (including powers to lease (*o*)) may be exercised on his behalf by the trustees of the settlement (*p*), or, if there should be none, by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, may order. Formerly applications to the Court for the grant of leasing powers to guardians were usually made under 11 Geo. 4 & 1 Will. 4, c. 65 (*q*).

Married women.—Apart from statute, a lease made by a married woman of her property without the concurrence of her husband was absolutely void (*r*), except where it was made in pursuance of an express power (*s*), and except also where the property had been settled to her separate use without any restraint upon alienation (*t*). But a demise of such property either by her and her husband together (*u*), or by the husband alone (*x*), is good while the coverture lasts, if made by deed (*y*); and even if made

(*f*) 1 Platt, 373. Leases at will possibly excepted: *Pigot v. Garnish*, Cro. Eliz. 734.

(*g*) 2 Black. Comm. 88.

(*h*) *Infra*, p. 63.

(*i*) 1 Platt, 379.

(*k*) Bac. Ab. Leases (I. 9).

(*l*) 45 & 46 Vict. c. 38.

(*m*) Sect. 59. A similar provision, referring to the Settled Estates Act of 1877, is contained in the Conv. Act, 1881 (44 & 45 Vict. c. 41), s. 41.

(*n*) Sect. 60. And see for similar powers under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 49.

(*o*) See *supra*, pp. 28 *et seq.*

(*p*) *In re Duke of Newcastle's Estates*, 24 Ch. D. 129; *In re Countess of Dudley's Contract*, 35 Ch. D. 338.

(*q*) Sect. 17. See *post*, p. 68, note (*h*).

(*r*) 1 Platt on Leases, 48.

(*s*) Sugden on Powers, Ch. 5, sect. 1, § 5.

(*t*) *Taylor v. Meads*, 4 D. J. & S. 597.

(*u*) *Doe v. Weller*, 7 T. R. 478.

(*x*) *Jordan v. Wikes*, Cro. Jac. 332; *Parry v. Hindle*, per Mansfield, C. J., 2 Taunt. 180.

(*y*) *Walsal v. Heath*, Cro. Eliz. 656.

by parol (*z*) it is valid during the husband's lifetime (*a*). If, however, she survive him, the lease becomes voidable by her by entry after his death (*b*) (and a parol lease becomes then, as against her, absolutely void (*c*)); but if she do nothing to disaffirm it, it will remain binding upon her (*d*). If, on the other hand, she die before her husband, the lease becomes void immediately upon her death, unless (the property being freehold) he acquire an estate by the curtesy in the lands demised (*e*), in which case the lease will remain good, but only till his death (*f*). As regards the wife's *leaseholds*, the husband's dominion at common law was even more extensive. All her terms (even those of which she was seised *in auter droit* as executrix or administratrix (*g*)) vested in him: he was entitled to receive the rents and profits of them (*h*): he could alienate them by assignment or by underlease (an agreement for an underlease operating for this purpose as a good disposition in equity (*i*)), even if such underlease was only made to commence after his own death (*k*): and upon his death (if he had made a disposition of them in his lifetime, for he could not do so by will (*l*)) his executors were entitled to the rents reserved by such underlease to the exclusion of the wife (*m*), while, if he survived her, they became to all intents and purposes his own (*n*).

Considerable inroad on these doctrines, however, has been made by statute law. In the first place, the Fines and Recoveries Act (*o*) enabled a married woman, provided she had her husband's concurrence, to make leases of her property by deed, such deed being acknowledged by her in the manner directed in that Act. Then the Settled Estates Act, 1877 (*p*), empowered a husband, entitled in right of his wife to the possession of any settled estates, or entitled to any unsettled estates as tenant by the curtesy, or in right of a wife seised in fee, to demise them, subject to certain provisions and restrictions (*q*), for a term not exceeding twenty-one years. And now the Settled Land Act, 1882 (*r*), provides

(*z*) For a term not exceeding three years: see *ante*, p. 10.

(*a*) *Bateman v. Allen*, Cro. El'z. 437.

(*b*) *Jordan v. Wilkes*, *supra*.

(*c*) *Walsal v. Heath*, *supra*.

(*d*) *Toler v. Slater*, L. R. 3 Q. B. 42.

(*e*) *Hove v. Scarrott*, 4 H. & N. 723, per Martin, B.

(*f*) *Miller v. Manwaring*, Cro. Car. 297.

(*g*) *Thrustout v. Coppin*, 2 W. Bl. 801.

(*h*) 2 Black. Comm. 434.

(*i*) *Steed v. Cragh*, 9 Mod. 43; *Druce v. Denison*, 6 Ves. 385.

(*k*) *Grute v. Locroft*, Cro. Eliz. 287.

(*l*) 2 Black. Comm. 434.

(*m*) *Blaxton v. Heath*, Poph. 145.

(*n*) 2 Black. Comm. 434; Co. Lit. 300 a.

(*o*) 3 & 4 Will. 4, c. 74, s. 79, amended by 45 & 46 Vict. c. 39, s. 7.

(*p*) 40 & 41 Vict. c. 18, s. 46.

(*q*) As to these, see the section, *supra*, a. p. 26.

(*r*) 45 & 46 Vict. c. 38, s. 61.

that where a married woman who, if she had not been a married woman, would have been a tenant for life, is entitled for her separate use, or under the Married Women's Property Act, 1882 (*s*), then she, without her husband, shall have the powers (*t*) of a tenant for life under the Act, and where she is otherwise entitled, then she and her husband together shall have such powers; nor shall a restraint on anticipation in the settlement prevent the exercise of those powers by her. The only case in which the concurrence of the husband becomes necessary is where both the marriage and the settlement were before the year 1883, and the wife is not entitled for her separate use: where she is so entitled, even though the legal estate for life be in the husband in right of the wife, still his concurrence is not necessary (*u*).

The Married Women's Property Act, 1870 (*x*), provided that certain special kinds of property set forth in the Act (*y*) should, when acquired by married women, be held to their separate use, and consequently (where the property was capable of being demised) gave them a power of disposal over it which entitled them to demise it. But that Act, with a saving as to rights and liabilities acquired whilst it was in force, is now repealed by the Married Women's Property Act, 1882 (*z*). By this Act a married woman may acquire, hold, and *dispose by will or otherwise* (*a*) of any real or personal property in the same manner as if she were a *feme sole*, and without the intervention of any trustee. This applies to the property of all women married after the commencement (1st January, 1883) of the Act (*b*), but as to those married before the Act, only to property their title to which accrues after the Act (*c*), such title being deemed for this purpose to accrue upon their first acquiring an interest, whatever that interest may be (*d*).

Persons of unsound mind, &c.—In general, a person of unsound mind, not so found by inquisition, may make leases as he may enter into other contracts; but such leases are voidable by him,

(*s*) See the next paragraph.

(*t*) As to these, so far as they relate to making leases, see *supra*, pp. 29 *et seq.*

(*u*) Wolstenholme on the Conv. Acts, p. 426 (9th ed.).

(*x*) 33 & 34 Vict. c. 93.

(*y*) See sects. 1, 7, 8.

(*z*) 45 & 46 Vict. c. 75. See sect. 22, now itself repealed, with the usual saving, by Stat. Law Rev. Act, 1898 (61 & 62 Vict. c. 22).

(*a*) Sect. 1, sub-s. 1.

(*b*) Sect. 2.

(*c*) Sect. 5.

(*d*) *Reid v. Reid*, 31 Ch. Div. 402.

and will be avoided at his instance, if it be shown that his condition was known to the other party (*e*). The mere existence, however, of insane delusions in the mind of a lessor, though directly connected with the subject-matter of the lease, is not sufficient to avoid it, unless they have rendered him incompetent to deal with his property (*f*). And (*g*) as regards a lunatic so found by inquisition (*h*), his committee may, under the direction of the judge in lunacy (*i*), and subject to such terms and conditions as he may approve (*k*), grant leases of any property of the lunatic for building, agricultural, or other purposes, and leases of minerals forming part of the lunatic's property, whether the same have already been worked or not, and either with or without the surface or other land (*l*). The committee may also be authorized to accept the surrender of old leases and grant new ones (*l*); and where the lunatic, having only a limited estate, has a power of making leases vested in him, the committee may be authorized to execute the power (*m*). The power to authorize leases extends to property of which the lunatic is tenant in tail, and every lease granted pursuant to any order under the Act binds his issue and all persons entitled in remainder or reversion expectant on the estate tail of the lunatic, including the Crown; and such persons are to have the same rights and remedies against the lessee, his executors, administrators and assigns, as the lunatic or his committee would have had (*n*). Moreover, by the Settled Land Act, 1882 (*o*), it is provided that where a tenant for life, or a person having the powers of a tenant for life under the Act, is a lunatic so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor or other authority in lunacy, exercise the powers of a tenant for life under the Act. He cannot, however, give valid notices, as required by sect. 45 (*p*), unless he has previously obtained authority from the Court of Lunacy to do so (*q*).

(*e*) See Pollock on Contracts, p. 93 (7th ed.); *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599.

(*f*) *Jenkins v. Morris*, 14 Ch. Div. 674.

(*g*) The Lunacy Act, 1890 (53 Vict. c. 5).

(*h*) The ensuing provisions apply also to certain other classes of lunatics specified in sect. 116: see, e.g., *In re Salt*, *infra*.

(*i*) Sect. 108.

(*k*) Sect. 122, sub-s. 2. See per Kay, L. J., *In re Ray*, [1896] 1 Ch. 468.

(*l*) Sect. 120.

(*m*) *Id.*; *In re Salt*, [1896] 1 Ch. 117.

(*n*) Sect. 122, sub-s. 1.

(*o*) 45 & 46 Vict. c. 38, s. 62. And see, for similar powers under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 49.

(*p*) *Supra*, p. 32.

(*q*) *In re Ray's Settled Estates*, 25 Ch. D. 464.

As regards the effect of leases made by them, persons in a state of intoxication stand on much the same footing as lunatics. A lease made by a person so intoxicated as obviously not to know what he was doing is, like any other contract (*r*), voidable by him afterwards (*s*); and, on the other hand, he may ratify it if he please (*t*).

The same principle, too, applies in cases of duress (*u*). When a person grants a lease to one who stands to him in a fiduciary relation, *e.g.*, a ward to his guardian (or to his late guardian (*x*), or to his guardian's son (*y*)), undue influence will be presumed to have been used (*z*); and if advantage be shown to have been taken of the grantor, the lease will be set aside (*a*), even after the lapse of years (*b*). In order to support such a lease, it is incumbent on the lessee to show that no better terms could have been obtained by the lessor (*c*). For a similar reason a lease made by a mortgagor to his mortgagee is one to be regarded by the courts with suspicion (*d*).

Convicts.—By the Act for the abolition of forfeitures (33 & 34 Vict. c. 23), it is provided (*e*) that no convict, *i.e.*, no person “against whom judgment of death or penal servitude shall have been pronounced or recorded, upon any charge of treason or of felony,” may alienate his property (unless he be lawfully at large under a licence (*f*)) during the time the conviction is in force. The Act (*g*) gives power to the Crown, in cases where a convict is possessed of property, to appoint an administrator, in whom such property vests on his appointment, and who may grant leases and deal generally with the property at his discretion (*h*).

Corporations.—Corporations may make leases of their property, provided the demise be made by deed sealed with their common seal (*i*). But companies incorporated under the Companies Acts may enter into contracts, if *intra vires*, to grant leases of their

(*r*) See Pollock on Contracts, *ubi sup.*

(*s*) *Butler v. Mulvihill*, 1 Bli. 137;

Say v. Barwick, 1 V. & B. 195.

(*t*) *Matthews v. Baxter*, L. R. 8 Ex. 132.

(*u*) Bac. Ab. Duress (C).

(*x*) *Dawson v. Massey*, 1 Ball & B. 219.

(*y*) *Aylward v. Kearney*, 2 Ball & B. 463.

(*z*) See notes to *Huquenin v. Bauley*, 1 Wh. & Tud. L. C. 247 (7th ed.).

(*a*) Compare *post*, p. 72.

(*b*) *Aylward v. Kearney*, *supra*.

(*c*) *Grosvenor v. Sherratt*, 28 Beav. 659.

(*d*) See *Hicks v. Cooke*, 4 Dow, 16.

(*e*) Sect. 8. As to the law before the Act, see *Doe v. Pritchard*, 5 B. & Ad. 765.

(*f*) Sect. 30.

(*g*) Sect. 9.

(*h*) Sect. 12. See *Carr v. Anderson*, [1903] 1 Ch. 90; *affd.*, C. A., 2 Ch. 279.

(*i*) 1 Platt on Leases, 147.

property, and such contracts may be made on their behalf in writing, signed by any person acting under their express or implied authority (*k*).

The Crown is a corporation, and its leases are restricted to terms of thirty-one years, or three lives (*l*). Most Crown lands are now vested in the Commissioners of Woods and Forests (*m*), whose leases are likewise restricted to thirty-one years (*n*). Certain conditions laid down in these Acts have also to be complied with: but none of them apply to the Crown's private estates, which are regulated by different statutes (*o*).

Corporations are of two kinds, lay and ecclesiastical. Lay corporations are themselves subdivided into the two branches of civil and eleemosynary, the former including universities and colleges (*p*), as well as the municipal bodies of various boroughs. All civil corporations possessed powers of leasing entirely unrestricted at common law (*q*). With regard more particularly to municipal corporations, the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), provides (*r*) that the council of an incorporated town shall not, unless authorized by Act of Parliament, lease any corporate land without the approval of the Local Government Board (*s*) for any term exceeding thirty-one years; they may, however, lease or agree to lease within that limit, so that there be reserved and made payable during the whole of the term such clear yearly rent as to them appears reasonable, without any fine (*t*). Moreover, under certain conditions specified in the Act (*t*), the letting, if it relates more particularly to buildings as distinguished from land, may extend to seventy-five years, and be either at a reserved rent, or on a fine, or both, as the council think fit (*u*).

Colleges and universities, being also civil corporations, were unfettered in their power of leasing by the common law (*x*). Various restrictions, however, have been imposed upon this power

(*k*) 30 & 31 Vict. c. 131, s. 37. See a similar section in the Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), s. 97.

(*l*) 1 Anne, stat. 1, c. 7, s. 5.

(*m*) 10 Geo. 4, c. 50, amended by 8 & 9 Vict. c. 99.

(*n*) Sect. 22. In the case of building leases, ninety-nine years: sect. 23.

(*o*) 25 & 26 Vict. c. 37, and 36 & 37 Vict. c. 61.

(*p*) *B. v. Vice-Chancellor of Cambridge*, 3 Burr. at p. 1656.

(*q*) 1 Kyd on Corporations, p. 108.

(*r*) Sect. 108.

(*s*) See sect. 109; *Davis v. Corporation of Leicester*, [1894] 2 Ch. 208. The sanction of the Local Government Board was substituted for that of the Treasury by 51 & 52 Vict. c. 41, s. 72.

(*t*) Sect. 108.

(*u*) As to the power of the council to renew leases, see sect. 110; *Att.-Gen. v. Corporation of Great Yarmouth*, 21 Beav. 625.

(*x*) Co. Lit. 44 a.

by statute, commencing with the Act 13 Eliz. c. 10, hereafter referred to (*y*). And now, by the Universities' and College Estates Act, 1858 (*z*), the universities and colleges comprised within this enactment may not in general grant leases for terms exceeding twenty-one years (*a*) (and not for so long, except in the case of building and mining leases (*b*), if the private statutes of the society forbid it (*c*)), and only subject to certain conditions therein contained, imposed for the protection of the grantors' successors. But nothing in the Acts is to prevent the said universities and colleges from granting leases which but for these Acts they might have granted under the provisions of any Act of Parliament or other authority (*d*). Moreover, by the Universities' and College Estates Act, 1898 (*e*), it is now provided (*f*) that for leasing purposes a university or college may exercise any of the powers conferred on a tenant for life by the Settled Land Acts, 1882 to 1890 (*g*), the Board of Agriculture being substituted, in the adaptation of those Acts, for the trustees of the settlement and for the Court, though such substitution is not to authorize the vesting of land in the Board (*h*). The power, however, of granting building leases with option of purchase is not to be exercised without the consent of the Board (*i*).

As regards the other branch of lay corporations, viz. the eleemosynary, the principal Act regulating their leasing powers is the Charitable Trusts Act, 1853 (*k*), which has, however, been amended by subsequent Acts, two of which, passed respectively in 1855 and 1869, may be here referred to. By the principal Act, leases authorized by the Charity Commissioners—and they have power, when they consider it beneficial to the charity, to authorize the letting of charity lands on building, repairing, improving, or other leases, or on mining leases, though such leases be not authorized by the trust (*l*)—are to have the same validity as if authorized by the express terms of the trust affecting the charity (*m*), and a "treasurer of public charities" was created for the purpose of vesting charity property (*n*). This official was, by the Act of 1855 (*o*), replaced by an "official trustee of charity lands," in

- (*y*) *Infra*, p. 51.
- (*z*) 21 & 22 Vict. c. 44, amended by 23 & 24 Vict. c. 59.
- (*a*) Sect. 10.
- (*b*) Sects. 11, 20.
- (*c*) 13 Eliz. c. 10, s. 4.
- (*d*) 21 & 22 Vict. c. 44, s. 30.
- (*e*) 61 & 62 Vict. c. 55.
- (*f*) Sect. 1.

- (*g*) *Supra*, pp. 28 *et seq.*
- (*h*) 1st sched.
- (*i*) Sect. 1.
- (*k*) 16 & 17 Vict. c. 137.
- (*l*) Sect. 21.
- (*m*) Sect. 26.
- (*n*) Sect. 47.
- (*o*) 18 & 19 Vict. c. 124, s. 15.

whom the lands vested in the former became vested, in like manner and on the same trusts; and the acting trustees of every charity were empowered to grant all such leases of land belonging to the charity and vested in the official trustee as they would have been able to grant in the administration of the charity if the land had been legally vested in themselves (*p*). The same Act provides (*q*) that all leases authorized by the Commissioners under it or the principal Act shall be valid and effectual notwithstanding any disabling Act (*r*) applicable to the charity whose estates are the subject of them; and that all leases granted by any trustees or persons acting in the management of any charity pursuant to or in conformity with any scheme for the letting of the property, or any part of the property, of the charity, prepared and approved by the Commissioners, shall be valid (*s*). But the Act directs (*t*) that "it shall not be lawful" for the trustees, or persons acting in the administration of any charity, to make or grant, otherwise than with the express authority of Parliament, or of a court of competent jurisdiction, or according to a scheme legally established (*u*), or with the approval of the Commissioners, any lease of its property "in reversion after more than three years of its existing term, or for any term of life, or in consideration, wholly or in part, of any fine, or for any term of years exceeding twenty-one years." It has been held that a lease granted in contravention of the above enactment for a term exceeding twenty-one years, without the approval of the Charity Commissioners, was not valid for twenty-one years, but absolutely void (*x*). By the Act, too, of 1869 (*y*), where trustees of a charity have power to lease, the right to exercise the power on behalf of the charity is given to a majority of the trustees assembled at a duly constituted meeting. (The Allotments Extension Act, 1882 (*z*), also contains a provision for trustees of charity lands to let them, under certain conditions, to cottagers and labourers of the parish in which they are situated.) Before the passing of these Acts, the trustees of a charity could have granted leases of any length (*a*), so long as such leases were "reasonable," and could be accounted of benefit to the charity: otherwise the

(*p*) Sect. 16.

(*q*) Sect. 38.

(*r*) *Infra*, p. 50.

(*s*) Sect. 39.

(*t*) Sect. 29.

(*u*) See *In re Mason's Orphanage*, [1896] 1 Ch. 54, 596.

(*x*) *Bangor (Bishop of) v. Parry*, [1891] 2 Q. B. 277. Cf. *infra*, p. 52.

(*y*) 32 & 33 Vict. c. 110, s. 12.

(*z*) 45 & 46 Vict. c. 80, ss. 4, 13.

(*a*) See on this point the observations of Stirling, J., in *In re Mason's Orphanage*, *ubi sup.*, where many of the earlier cases are collected.

Court of Chancery, in virtue of its general powers of supervision in such matters, would have interfered and set them aside (*b*) after an interval however long, until saved by the Statute of Limitations (*c*), which applies to charities (*d*). But some eleemosynary corporations are within the operation of the statute 13 Eliz. c. 10, presently referred to (*e*).

Ecclesiastical corporations are either sole or aggregate; and as regards the power of leasing their lands, there was at common law this important difference between them, that the latter could grant leases of any length of their own bare authority, whereas for the leases of the former (if made to endure beyond the life of the person granting them and actually forming the corporation sole) to be valid as against the grantor's successors, the consent or confirmation of certain persons designated by law was always required. Thus, in order to be valid as against his successors, a lease by an incumbent required the consent of the patron and ordinary, and a lease by a bishop that of the dean and chapter (*f*). To prevent, however, the unreasonable exercise of these powers and to regulate their employment, various statutes, generally referred to as the Enabling and Disabling Acts, have been passed at different times.

The first of these—the statute 32 Hen. 8, c. 28—applied only to corporations sole (*g*), other than parsons and vicars (*h*) (*e.g.*, to bishops), and authorized them to make leases of their lands, by deed indented, for a term not exceeding twenty-one years or three lives, provided that such leases were not made without impeachment of waste, and that at least the same yearly rent were reserved as had been usually paid within the twenty years next before (*i*): with a further proviso, in the case of concurrent leases, that the old lease should expire or be surrendered within one year after the making of the new lease (*j*). Leases made in accordance with the above provisions were absolutely binding, without any confirmation being necessary. Hence (as the Act was purely an enabling one) long leases could still be made by the corporations sole to whom the statute applied, if confirmed in the manner

(*b*) *Att.-Gen. v. Owen*, 10 Ves. 555;
Att.-Gen. v. Cross, 3 Mer. 524.

(*c*) 3 & 4 Will. 4, c. 27.

(*d*) *St. Mary Magdalen v. Att.-Gen.*,
6 H. L. C. 189.

(*e*) *Magdalen Hospital v. Knotts*, 4
App. Ca. 324; *infra*, p. 52.

(*f*) Co. Lit. 44a.

(*g*) *Bishop of Salisbury's case*, 10 Co.
at p. 60 a.

(*h*) See sect. 4.

(*i*) Sects. 1, 2.

(*j*) The repeal of this Act by 19 & 20
Vict. c. 120, s. 35 (*supra*, p. 25), ex-
pressly excepts ecclesiastical leases.

required by the common law, *e.g.*, by bishops if confirmed by the dean and chapter; but of this power they were deprived by the statute 1 Eliz. c. 19, which provided (*k*) that all leases made by bishops, of lands, being parcel of the possessions of their bishoprics, other than for the term of twenty-one years or three lives from such time as such lease should begin, and whereupon the accustomed yearly rent or more should not be reserved, should be void. A similar provision was, by the Act 13 Eliz. c. 10 (*l*), made to apply to parsons and vicars (who, as before stated, were expressly excluded from the scope of the enabling Act of Henry VIII.), as well as to corporations aggregate (*e.g.*, deans and chapters, or the governors of a hospital (*m*)), who were thus reduced to the same footing as corporations sole, except that still no confirmation of their leases was necessary. And from the fact that by this statute it is necessary that the *accustomed* rent should be reserved, it follows that no lease could be made under it of lands that had not been let before (*n*). By a statute of the following year, however, forty years' leases were allowed, subject to certain restrictions, of houses (not being the lessors' ordinary dwelling-houses) in or near cities and corporate towns, and of the grounds not exceeding ten acres belonging thereto (*o*). And a further Act was passed a few years later (*p*) to restrain the spiritual persons designated in 13 Eliz. c. 10 from making leases in reversion, by providing that no new lease granted by such persons should be good, if a lease were already in being which was not to expire or be surrendered within three years after the making of the new lease (*q*).

Both these disabling Acts (*r*), it may be observed, provide that leases not made in accordance with their provisions shall be void. Yet by a series of decisions (*s*) it has come to be established that such leases are not void altogether, but only voidable (*t*): that they are good as against the grantor himself if a corporation sole (*u*), and, in the case of a corporation aggregate, good during the lifetime of its head (*x*): and that they are voidable at the

(*k*) Sect. 5.(*l*) Sect. 3.(*m*) *Moore v. Olench*, 1 Ch. D. 447.(*n*) *Doe v. Yarborough*, 1 Bing. 24.(*o*) 14 Eliz. c. 11, s. 17; *Vivian v. Blomberg*, 3 Bing. N. C. 311.(*p*) 18 Eliz. c. 11. See s. 2.(*q*) Restrictions specially relating to the renewal of ecclesiastical leases are imposed by s'tat. 6 & 7 Will. 4, c. 20.(*r*) 13 Eliz. c. 10, and 18 Eliz. c. 11.(*s*) See Bac. Ab. Leases (H.).(*t*) *Pennington v. Cardale*, 3 H. & N. 656.(*u*) *Bishop of Salisbury's case*, 10 Co. 58 b.(*x*) See *Roe v. Archbishop of York*, 6 East, 86, at p. 103, per Lord Ellenborough, C. J.

option only of the grantors' successors, the reason according to Lord Coke being that the statute was made for the benefit of the latter (y). A strong disposition, however, to return to the words of the statute has in modern times been shown by the House of Lords; and in the case at all events of an ecclesiastical corporation the whole of whose property is devoted to charity (where there can be no question of protecting successors against predecessors), a lease not in accordance with the statute is not voidable but absolutely void (z).

Parsons and vicars are not (as it has already been pointed out) "enabled" to make leases by the statute of Henry VIII.; and though they are within the statute of Elizabeth (13 Eliz. c. 10), the sole effect of that statute upon leases made by them is to impose the restrictions therein laid down. It follows that even if they make a lease under it, it must still receive the confirmation of the patron and ordinary before it can be effectual (a). Without confirmation, it has often been held that a lease granted by the incumbent of a benefice operated at common law as a demise for so long only as he continued in the incumbency (b). The leasing power of incumbents was, however, extended by an Act passed in the year 1842 (c), which authorized them to make farming leases of the lands belonging to their benefices (other than the parsonage and ten acres of glebe) for terms not exceeding fourteen or, in cases where the lessee takes upon himself the burden of certain specified covenants, twenty years. But the consent of the bishop and of the patron of the benefice is still necessary; and certain restrictions, for details of which the Act itself should be consulted, are imposed for the protection of the grantor's successors. It may be added that this Act has been held not to have repealed the earlier statute 13 Eliz. c. 10; hence an incumbent may still properly demise his lands so long as he conform with the provisions of the Act of Elizabeth, even though the requirements of the modern statute remain unsatisfied (d).

In the same year (1842) was passed the Ecclesiastical Leasing Act (e), which gives further leasing powers to all ecclesiastical

(y) Co. Lit. 45 a.

(z) *Magdalen Hospital v. Knolls*, 4 App. Ca. 324. Cf. *Bangor (Bishop of) v. Parry*, [1891] 2 Q. B. 277, cited *supra*, p. 49.

(a) *Bac. Ab. Leases* (F., G.).

(b) See *Price v. Williams*, 1 M. & W. 6; *Cole, Ejec.* 602.

(c) 5 & 6 Vict. c. 27, s. 1. As to reservation of rent in leases under this statute, see *Jenkins v. Green*, 27 Beav. 440.

(d) *Jenkins v. Green*, 28 Beav. 87.

(e) 5 & 6 Vict. c. 108; amended by 21 & 22 Vict. c. 57.

corporations, both aggregate and sole (*f*), by enabling them, with the consent of the Ecclesiastical Commissioners and of other persons specified in the Act (*g*), to grant building or repairing leases (*h*) for terms not exceeding ninety-nine years, and mining leases (*i*) and leases of easements (*k*) for terms not exceeding sixty years, subject to certain restrictions imposed for the benefit of the grantors' successors. And where it is made to appear to the Ecclesiastical Commissioners that it would be to the permanent advantage of the corporation, leases may be made for such terms and in such manner as the said commissioners may think advisable (*l*). Again, by the statute 14 & 15 Vict. c. 104 (*m*), provision is made for enabling any ecclesiastical corporation, sole or aggregate, to lease lands acquired by them by the authority of that Act from year to year, or for a term of years in possession not exceeding fourteen years, the best obtainable rent being reserved, and (with the approval of the Church Estates Commissioners) for granting mining and building leases of such lands for any term and in any manner the commissioners may think fit (*n*). By a later Act (23 & 24 Vict. c. 124), it is provided (*o*) that no bishop or archbishop shall make a lease of the lands assigned as the endowment of any see under the Act for a term exceeding twenty-one years, nor unless subject to conditions similar to those contained in the Act dealing with the leasing powers of incumbents (5 & 6 Vict. c. 27, *supra*): but with the approval of the Estates Committee of the Ecclesiastical Commissioners he may grant mining, building, or other leases for such periods and upon such terms as the committee may think proper.

The earlier Acts did not extend to ecclesiastical property of copyhold tenure: hence incumbents, for instance, could, and frequently did, make leases of such lands to endure for very long terms. But of this power they were deprived by the statute 24 & 25 Vict. c. 105 (*p*), which placed copyholds in this respect on the same footing as lands of other tenure.

Parish officers.—At common law a lease of parish property by parish officers (*i.e.*, churchwardens and overseers) created merely

(*f*) Colleges and hospitals, and a few other specified ecclesiastical bodies, are excepted from the Act.

(*g*) Sect. 20. See *Eccles. Commissioners v. Wodehouse*, [1895] 1 Ch. 552.

(*h*) Sect. 1.

(*i*) Sect. 6.

(*k*) Sect. 4.

(*l*) 21 & 22 Vict. c. 57, s. 1.

(*m*) A temporary Act amended and continued by numerous later Acts.

(*n*) Sect. 9. For a similar provision under the Ecclesiastical Leasing Act, 1858, see 21 & 22 Vict. c. 57, s. 9.

(*o*) Sect. 8.

(*p*) Sect. 1, amended by 25 & 26 Vict. c. 52.

a tenancy from year to year (*q*). The statute 59 Geo. 3, c. 12, however, has enabled them to make regular leases of such lands (which it directs that they are to hold as a body corporate (*r*)), provided it be with the consent of the inhabitants in vestry assembled, who are to fix the rent and length of the term (*s*). The lands so leased are not to exceed twenty acres in the whole (*t*). Such leases should be made by both churchwardens and overseers, as the property, by force of the statute, vests in both (*u*); the execution of an instrument of demise by one parish officer alone is insufficient, at least unless it be shown that he acted as agent for the others also (*x*). The statute, it may be observed, has been held not to extend to copyhold lands (*y*). Moreover, as regards rural parishes, the powers, duties, and interests vested by it in parish officers and vestries have now been transferred to the parish council, constituted in the manner provided for in the Local Government Act, 1894 (*z*).

District, parish, and county councils.—By the Allotments Act, 1887 (*a*) (as affected by the Local Government Act, 1894) (*b*), power is given to district councils (*c*), under conditions therein laid down, to acquire land, whether within or without their district, by hire or purchase, for the purpose of letting it in allotments to labourers residing in the district (*d*). The council, who are authorized to execute improvements of a specified character on the land with a view to adapting it for letting in allotments (*e*), may make regulations with regard to such letting: such regulations to make provision for reasonable notice to be given to the tenant of any allotment of the determination of his tenancy, and to be confirmed by the Local Government Board (*f*). But the size of an allotment in the hands of any one person is not to

(*q*) *Doe v. Terry*, 4 A. & E. 274.

(*r*) Sect. 17; *Smith v. Adkins*, 8 M. & W. 362; *Gouldsworth v. Knights*, 11 M. & W. 337.

(*s*) Sect. 13.

(*t*) Sect. 12.

(*u*) *Woodcock v. Gibson*, 4 B. & C. 462.

(*x*) *Doe v. Gower*, 17 Q. B. 589.

(*y*) *Att.-Gen. v. Lewin*, 8 Sim. 366; *In re Paddington Charities*, *id.*, 629. See cases on this statute collected in *St. Nicholas, Deptford v. Sketchley*, 8 Q. B. 394.

(*z*) See 56 & 57 Vict. c. 73, ss. 1, 5 (2), 6 (1), 52 (4), (5), 67; and (as to

parishes without separate council) s. 19. See, further, as to the application of the Loc. Govt. Act to urban districts, s. 33.

(*a*) 50 & 51 Vict. c. 48. Provisions of a similar kind are to be found in earlier Acts, e.g., 2 & 3 Will. 4, c. 42; 8 & 9 Vict. c. 118 (s. 109); 36 & 37 Vict. c. 19; 45 & 46 Vict. c. 80.

(*b*) 56 & 57 Vict. c. 73.

(*c*) In substitution for the sanitary authority: see ss. 21, 25 of last-cited Act.

(*d*) 50 & 51 Vict. c. 48, s. 2 (1).

(*e*) Sect. 5.

(*f*) Sect. 6 (1).

exceed one acre, nor may any allotment be sub-let (*g*); the rent, payment of which may be recovered in the ordinary manner (*h*), and (though for not more than one quarter) required in advance (*i*), is to be reasonable in amount but not less than is sufficient to protect the council from loss (*k*), and no building, other than a tool-house, shed, greenhouse, fowl-house, or pig-stye may be erected on any part of the allotment (*l*). If, however, an allotment cannot be let in accordance with these provisions, it may be let to any person whatever at the best obtainable rent, without any premium or fine, and on such terms as may enable possession to be resumed within a period not exceeding twelve months if required for a letting in accordance with them (*m*).

The same powers are now also vested in parish councils (*n*), and (in rural parishes without separate parish council), by consent of the county council, in parish meetings (*o*). The parish council, however, may let to one person an allotment or allotments exceeding one acre, but if the land is hired compulsorily (*p*), not exceeding in the whole four acres of pasture, or one acre of arable and three acres of pasture; they may permit to be erected on the allotment any stable, cow-house, or barn, but they shall not break up, or permit to be broken up, any permanent pasture, without the assent in writing of the landlord (*q*). No consent or approval which may be necessary under the Charitable Trusts Acts (*r*) is required where the letting of land by the council is for the purpose of allotments, such consent or approval being necessary where the letting is not for allotments if it exceed in length one year (*s*).

By the Small Holdings Act, 1892 (*t*), county councils (*u*) are empowered (*x*), where persons desirous of themselves cultivating small holdings are unable to buy (*y*) on the terms fixed by the Act, or where the land has been hired by the council on lease or

(*g*) Sect. 7 (3).

(*h*) Sect. 8 (1).

(*i*) Sect. 7 (1).

(*k*) *Id.* As to payment of rates and taxes, see sub-sect. (2), referred to *post*, p. 183.

(*l*) Sect. 7 (5).

(*m*) Sect. 7 (4).

(*n*) 56 & 57 Vict. c. 73, s. 10 (6). This holds even where the land has, under the provisions of 53 & 54 Vict. c. 65, s. 2, been acquired by the county council: see 56 & 57 Vict. c. 73, s. 9 (14).

(*o*) 56 & 57 Vict. c. 73, s. 19 (10).

(*p*) See sect. 10 (1).

(*q*) Sect. 10 (6).

(*r*) See *supra*, p. 48.

(*s*) Sect. 8 (2). Whether designed, however, for allotments or not, the consent of the Local Government Board to a letting for more than a year is in certain specified cases necessary: *id.*

(*t*) 55 & 56 Vict. c. 31. See Addendum.

(*u*) See sect. 20, and as to the delegation of their powers, see sect. 16, as modified by 56 & 57 Vict. c. 73, s. 6 (4).

(*x*) 55 & 56 Vict. c. 31, s. 4 (2).

(*y*) The primary mode of disposition of land under the Act is sale and not letting.

otherwise (*z*), to offer to let the holding (*a*) in accordance with rules to be made by the council under the Act: such rules being made to relate in particular to the manner in which holdings are to be let or offered for letting, and to the means for securing a proper cultivation (*b*) of the holding (*c*). The letting, which may be to a number of persons working on the co-operative system, if such system be approved by the council (*d*), may only be made of a small holding which, exceeding in extent one acre (*e*), either does not exceed fifteen acres, or, if exceeding fifteen acres, is of the annual value for the purpose of the income tax of not more than 15*l.* (*f*): and the rent must be such as will, having regard to the price paid for the acquisition of the land, secure the council against loss (*g*). The council, who are empowered to execute certain kinds of improvements on the land to adapt it for small holdings (*h*), may also, if they think fit, as part of the agreement for letting, adapt the land for this purpose by erecting thereon such buildings, or making such adaptations of existing buildings, as in their opinion are required for the due occupation of the holding and cannot be made by the tenant (*i*). The holding is to be let on the condition that it may not (*k*) be divided, assigned, or sub-let without the consent of the council (*l*); that it be cultivated by the occupier and not used for any purpose other than agriculture (*m*): and that certain restrictions which are imposed by the Act on the nature, user, and number of the dwelling-houses and buildings that may be erected on the holding are observed (*n*). If any of such conditions or any term of the letting be broken, the council may, after giving the tenant an opportunity of remedying the breach if it is capable of remedy, determine the tenancy (*o*); but the council may under special circumstances consent, on such terms as they may think fit, to the letting of a small holding free from all or any of such conditions (*p*). The council may also let land otherwise than under the provisions of the Act, where they are of opinion that any land acquired by them under the Act is not needed or is

(*z*) See *post*, p. 73.

(*a*) "Land" in the Act includes any right or easement in or over land: sect. 20.

(*b*) Defined in sect. 20.

(*c*) Sect. 7.

(*d*) Sect. 4 (3).

(*e*) Sect. 1 (2).

(*f*) Sect. 4 (2).

(*g*) Sect. 18 (1).

(*h*) Sect. 3 (2).

(*i*) Sect. 3 (3).

(*k*) Sect. 9 (7).

(*l*) Sect. 9 (1).

(*m*) *Id.*, and see sect. 20.

(*n*) Sect. 9 (1).

(*o*) Sect. 9 (7). As to the tenant's power of removing certain fixtures, see *post*, p. 702.

(*p*) Sect. 9 (6).

unsuitable for small holdings, or that it cannot be sold or let under its provisions, or that more suitable land is available (*q*); and they may, while any sale of a holding is pending in pursuance of the Act, temporarily let the holding for such time and in such manner as they think expedient (*r*).

Executors and administrators.—Executors and administrators have power to dispose of terms of years vested in them in right of their testators and intestates, by granting leases out of them (*s*). And an executor may do this even before probate, as the estate vests in him immediately on the death of the testator (*t*), though if he refuse probate he cannot lease after administration has been granted to another (*u*); but an administrator can only do so after he has obtained his letters of administration, because these alone constitute his title (*x*). In the case of *freeholds*, too, belonging to persons dying after the year 1897, these now also vest in their personal representatives (*y*), whose power to lease them would appear to be the same as in the case of leaseholds (*z*); though in this case, in the event of intestacy, the legal estate, and probably the power of leasing, would apparently, until the grant of letters of administration, be vested in the heir-at-law (*a*). Leasing, however, by executors and administrators (who are in the position of trustees for the beneficial owners) is an act “not regularly within their province” (*b*), and though circumstances may justify them in granting a lease instead of selling the premises, persons taking a lease from them may be called upon to show that the act was for the advantage of the estate (*c*), and even that it was the best way of administering the assets (*d*). Hence an option of purchase, for instance (*e*), in such a lease is bad, because it prevents a sale during the time it runs to any one but the lessee, and this even though it appear that the lease in other respects is advantageous to the estate (*f*). So a lease granted by an administrator to a party who

(*q*) Sect. 15 (1).

(*r*) Sect. 15 (2).

(*s*) *Bac. Ab. Leases* (I. 7); 1 Wms. Exors. 707 (10th ed.); *Grissell v. Robinson*, 3 Bing. N. C. 10; *Chambers v. Kingham*, 10 Ch. D. 743.

(*t*) *Roe v. Summerset*, 2 W. Bl. 692.

(*u*) *Broker v. Charter*, Cro. Eliz. 92.

(*z*) 1 Wms. Exors. 314.

(*y*) 60 & 61 Vict. c. 65, s. 1.

(*z*) *Id.*, s. 2.

(*a*) See *John v. John*, [1898] 2 Ch. 573, per North, J. (There was no

appeal on this point.) As to the vesting of *leaseholds* under the above circumstances, see 21 & 22 Vict. c. 95, s. 19, as modified by the Jud. Act, 1873 (36 & 37 Vict. c. 66), ss. 12, 16.

(*b*) Per Sir E. Sugden, L. C., *Keating v. Keating*, Lloyd & G. (Ir.) 133.

(*c*) *Keating v. Keating*, *supra*.

(*d*) *Oceanic Steam Navigation Co. v. Sutherland*, 16 Ch. Div. 236, per Jessel M. R., at p. 243.

(*e*) As to this, see p. 312, *post*.

(*f*) Case last cited.

had notice that a sale was required by the persons beneficially interested was set aside at their instance (*g*).

If there be two or more executors (they being for this purpose in the position of joint tenants (*h*)), a lease by one will be as valid as if it were made by all, whether or not it purport to be the grant of all (*i*), and whether or not he reserve rent to himself only and not to his co-executors (*k*); and the same holds good of administrators (*l*). One of several executors to whom land is devised in trust may accept a tenancy thereof from his co-executors, and if he does, the payment of rent may be enforced against him in the usual way by distress (*m*). Where a term of years (*n*) has been specifically bequeathed or devised, the executor's power of leasing is at an end when he has once assented to the bequest, because the interest in the term thereupon vests at once in the legatee or devisee (*o*); hence, before taking a lease from an executor it is advisable to ascertain whether the premises have been the subject of a specific bequest, and, if so, whether such bequest has received the executor's assent. Where an executrix or administratrix is a married woman, the power of disposition over the whole personal estate belonged, at common law, to the husband, and all demises must consequently have been made by him (*p*). But this seems now to be changed by the Married Women's Property Act (*q*).

Mortgagors and mortgagees.—At common law, a mortgagor though in possession could not, after the mortgage, make a lease of the property without the consent of the mortgagee (*r*), unless a power to that effect was expressly given to him in the mortgage deed (*s*); and if he did, the mortgagee could treat the tenant as a mere trespasser (*t*), though the latter was entitled in equity to redeem the mortgage (*u*). (But leases made *before* the mortgage are good, the mortgagee, upon giving the tenant notice of the mortgage, becoming entitled to the rent then in arrear, if due

(*g*) *Drohan v. Drohan*, 1 Ball & B. 185.

(*h*) 1 Wms. Exors. pt. 3, bk. 1, ch. 2.

(*i*) See *Simpson v. Gutteridge*, 1 Madd. 609.

(*k*) See *Doe v. Sturges*, 7 Taunt. 217.

(*l*) *Jacomb v. Harwood*, 2 Ves. sen. 265.

(*m*) *Cowper v. Fletcher*, 6 B. & S. 464.

(*n*) The same thing would now seem to apply to *freeholds* where the owner dies after the year 1897: see 60 & 61 Vict. c. 65, s. 3.

(*o*) *Doe v. Guy*, 3 East, 120; 2 Wms. Exors. 1107. See *post*, p. 442.

(*p*) *Thrustout v. Coppin*, 2 W. Bl. 801.

(*q*) See the statute 45 & 46 Vict. c. 75, s. 24.

(*r*) *Keech v. Hall*, 1 Doug. 21; 1 Sm. L. C. 511.

(*s*) *Rogers v. Humphreys*, 4 A. & E. 299.

(*t*) *Keech v. Hall*, *supra*.

(*u*) *Tarn v. Turner*, 39 Ch. Div. 456.

after the mortgage, as well as to what accrues afterwards (*v.*) Such a lease, however, might of course under special circumstances become binding on the mortgagee, and on parties claiming under him, by an application of the ordinary doctrine of estoppel (*w.*), if he should have so conducted himself as to lead the other parties to believe that the lease could validly be granted (*x.*). Moreover, a lease of this kind was always valid by way of estoppel (*y.*) between the parties, and the tenant, in accordance with a principle hereafter explained (*z.*), having accepted possession from the mortgagor, was not allowed afterwards to dispute his right to demise (*a.*). So, on the other hand, the fact that such estoppel is reciprocal (*b.*) renders the mortgagor, upon the mortgagee exercising his right to eject the tenant, liable to an action (upon the covenant for quiet enjoyment (*c.*)), at the suit of the latter (*d.*). But though the mortgagee may evict a lessee of the mortgagor under a lease made after the mortgage, no tenancy is created by the mere fact of the mortgage between the lessee and the mortgagee; and hence the latter cannot recover rent from the former by action or distress (*e.*). A new tenancy, however, may be created between them by mutual consent (*f.*): as, for instance, by payment of rent (*g.*) (unless the intention of the parties was otherwise (*h.*)), or by attornment (*i.*) on the part of the lessee, or by any act on the part of the mortgagee which amounts to a recognition of the lessee as his tenant (*j.*).

What may amount to such recognition is in each case a question of fact (*k.*). The receipt of interest, however, on the mortgage debt, by the mortgagee, has been held not to amount of itself to such a recognition (*l.*), unless the payment of money *eo nomine* as interest has been demanded and obtained from the tenant by the mortgagee, with full knowledge of all the circumstances (*m.*); nor does the mere fact of the mortgagee having occasionally visited

(*v.*) *Moss v. Gallimore*, 1 Doug. 279; 1 Sm. L. C. 514; *post*, p. 165.

(*w.*) Cf. p. 361, *post*.

(*z.*) *Keith v. Gancia*, [1904] 1 Ch. 774.

(*y.*) *Cuthbertson v. Irving*, 6 H. & N. 135.

(*a.*) *Post*, pp. 466 *et seq.*

(*b.*) *Alchorne v. Gomme*, 2 Bing. 54.

(*c.*) Co. Lit. 352 a; *post*, p. 473.

(*d.*) See p. 297, *post*.

(*e.*) *Haricup v. Bell*, C. & E. 19, Manisty, J.; affirmed on appeal, *id.*, 21. n.

(*f.*) *Rogers v. Humphreys*, 4 A. & E. 290.

(*g.*) *Brown v. Storey*, 1 M. & Gr. at p. 126, per Tindal, C. J.; *Pole v. Davis*, 1 F. & F. 284.

(*h.*) *Doe v. Barton*, 11 A. & E. at p. 315; *Doe v. Thompson*, 9 Q. B. 1037.

(*i.*) *Wheeler v. Branscombe*, 5 Q. B. 373. See per Coleridge, J.

(*j.*) As to this, see *post*, p. 462.

(*k.*) See 1 Sm. L. C. 521 *et seq.*, where the cases are collected.

(*l.*) *Underhay v. Read*, 20 Q. B. Div. 209, per Manisty, J.

(*m.*) *Doe v. Cadwallader*, 2 B. & Ad. 473.

(*n.*) *Doe v. Hales*, 7 Bing. 322.

the property, and inspected improvements made thereon by the tenant (*n*). A mere notice, again, of the mortgage to the lessee, with a request, not assented to, to pay the rent to the mortgagee, is not a sufficient recognition (*o*). Nor does continuance of possession by the lessee after the receipt of such notice even constitute evidence from which a tenancy to the mortgagee may be inferred (*p*). Moreover, recognition, even where it is sufficient, will not have relation back to the date of the notice, so as to entitle the mortgagee to all rent accrued since that date (*q*) (though if he enters after the notice he can, as against the tenant, apparently maintain trespass for mesne profits in respect of rent accrued before such entry (*r*)); by express agreement, however, between the tenant and the mortgagee, *e.g.*, where the former expressly attorns as from a previous day to the latter, this may be otherwise (*s*). Where a new tenancy is impliedly raised between the mortgagee and the lessee, the effect of its creation is that the lease previously held by the tenant is determined (*t*). Such new tenancy is a tenancy from year to year (*u*), subject, however, to the terms and conditions of the former lease, so far as they are applicable to a yearly tenancy (*x*); but the view has been expressed that those terms must (in accordance with a principle hereafter referred to (*y*)) be proved by evidence, and that the mere fact that the tenant is paying rent to the mortgagee is no evidence that the tenancy is to be on the same terms as those on which the tenant held under the mortgagor (*z*).

On the other hand, neither could the mortgagee, although in possession, make a lease (independently of statute) valid as against the mortgagor if he chose afterwards to redeem (*a*), unless "to avoid an apparent loss, or merely in necessity" (*b*); so that where it was proposed to make a lease of lands which were already in

(*n*) *Doe v. Hughes*, 11 Jur. 698.

(*o*) *Evans v. Elliot*, 9 A. & E. 342 (in effect overruling *Pope v. Biggs*, 9 B. & C. 245, and *Waddilove v. Barnett*, 2 Bing. N. C. 538).

(*p*) *Towerson v. Jackson*, [1891] 2 Q. B. 484.

(*q*) *Evans v. Elliot*, *supra*.

(*r*) See *Ocean Accident Corporation v. Ilford Gas Co.*, [1905] 2 K. B. 493. As to mesne profits, see *post*, p. 771.

(*s*) *Gladman v. Plummer*, 15 L. J. Q. B. 79; *Roulston v. Caldwell*, [1895] 2 I. R. 136.

(*t*) *Corbett v. Plowden*, 25 Ch. Div. 678.

(*u*) *Doe v. Ongley*, 10 C. B. 25.

(*x*) *Cole*, Ejec. 476.

(*y*) See *post*, p. 396.

(*z*) *Keith v. Gancia*, [1904] 1 Ch. 774, per Joyce, J. But it is submitted that as there is always a presumption to the above effect (see p. 396, *post*), this statement of the law cannot be regarded as altogether correct. The judgment was affirmed by the C. A., but this point was not dealt with.

(*a*) See *Franklin v. Ba'l*, 33 Beav. 560.

(*b*) *Hunzford v. Clay*, 9 Mod. 1, per Lord Macclesfield, L. C.

mortgage, it was common for both mortgagor and mortgagee to join in making it (c).

It will be seen hereafter (d) that, with regard to holdings which are the subject either of the Agricultural Holdings Act (e), or of the Allotments Compensation Act (f), where a person occupies land under a contract of tenancy from year to year, or for a term, not exceeding twenty-one years, at rack-rent, which is not binding on the mortgagee (g), the latter cannot now deprive him of possession (otherwise than in accordance with such contract) without giving him six months' notice in writing (h).

The Conveyancing Act (i) now provides (k), as regards mortgages made on or after the 1st January, 1882 (and even as regards mortgages before that date if the parties agree to that effect in writing (l)), that, unless a contrary intention is expressed (m) in the mortgage deed, or otherwise in writing (n), a mortgagor of land while in possession (o) shall, as against every incumbrancer, and a mortgagee while in possession (o) shall, as against all prior incumbrancers (if any) and as against the mortgagor, have power to make from time to time any lease (p) of the mortgaged land, or any part thereof, as follows:—an agricultural or occupation lease for any term not exceeding twenty-one years, and a building lease (q) for any term not exceeding ninety-nine years.

A lease of a house and land is not the less an occupation lease "of the mortgaged land or any part thereof" because it comprises furniture which is let with the house at a single rent, and because it comprises the right to shoot over a part of the land which is not included in the demise, but from which the right of shooting has,

(c) See, for instance, *Russell v. Stokes*, 1 H. Bl. 562; *Smith v. Pocklington*, 1 C. & J. 445; *Doe v. Adams*, 2 C. & J. 232; *Saunders v. Merryweather*, 3 H. & C. 902.

(d) *Post*, p. 753.

(e) See 46 & 47 Vict. c. 61, s. 54; *post*, p. 728.

(f) See 50 & 51 Vict. c. 26, s. 4; *post*, p. 749.

(g) Not being made under the provisions of the Conv. Act, *infra*.

(h) 53 & 54 Vict. c. 57, s. 2, sub-s. (2). It is submitted that, having regard to the preamble and sect. 1 of the Act, a "contrary intention appears" sufficiently within 52 & 53 Vict. c. 63, s. 3, to exclude the wider interpretation therein given to the word "land," and restrict it to holdings as stated in the text.

(i) 44 & 45 Vict. c. 41.

(k) Sect. 18. See definitions of "mortgage," "mortgagor," and "mortgagee" in s. 2 (6).

(l) Sect. 18, sub-s. 16; *Re Nugent*, 49 L. T. 132. Such agreement, however, is not to prejudice any right or interest of any mortgagee not joining in or adopting it: sub-s. 16.

(m) So that if such intention be expressed the former law still applies.

(n) Sub-s. 13. And subject to the terms of the deed or of such writing, and to the provisions therein contained: *id*.

(o) See *John Brothers, &c., Co. v. Holmes*, [1900] 1 Ch. 188.

(p) Sub-ss. 1, 2, 3.

(q) As to building leases (defined in s. 2 (10)), see more particularly s. 18, sub-ss. 9, 10.

at the time of the lease, already been severed (*r*). Nor (it has been said) is a lease the less an agricultural lease because the sporting rights have been reserved (*s*).

Every such lease must be made to take effect in possession within twelve months (*t*): it must reserve the best rent reasonably obtainable (without fine) (*u*): it must contain a covenant by the lessee for payment of the rent and a condition of re-entry on non-payment within a time therein specified not exceeding thirty days (*x*): and a counterpart of every such lease must be executed by the lessee (*y*) and delivered to the lessor (*z*). In the case of a lease by a mortgagor, he must deliver within a month to the mortgagee, or, where more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee, but the lessee is not to be concerned to see that this provision is complied with (*a*).

Nothing in the Act is to prevent the mortgage deed from conferring on the mortgagor, or mortgagee, or both, any further powers of leasing; and such powers are to be exercisable as far as may be as if conferred by the Act, and with all the like incidents, effects, and consequences, unless an intention to the contrary is expressed in the mortgage deed (*b*). But nothing in the Act is to be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor with the concurrence of all the incumbrancers if the Act had not been passed (*c*). A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease, if granted, would be binding (*d*). And all the foregoing provisions referring to a lease are to be construed to extend and apply, as far as circumstances admit (*e*), to any letting, and to an agreement, whether in writing or not, for leasing or letting (*f*). It has been held that where a lease is made by a

(*r*) *Brown v. Peto*, [1900] 2 Q. B. 653 (reported as *Browne v. Peto*, 69 L. J. Q. B. 869).

(*s*) *Id.*, [1900] 1 Q. B. 846, per Bigham, J. See the definition of "land" in s. 2 (2).

(*t*) Sect. 18, sub-s. 5.

(*u*) Sub-s. 6; *Renner v. Tolley*, 68 L. T. 815. The words "rent" and "fine" are defined in s. 2 (9).

(*x*) Sect. 18, sub-s. 7.

(*y*) See note (*r*), p. 30, *supra*.

(*z*) Sub-s. 8. Of such execution and delivery, execution of the lease by the

lessor is sufficient evidence in favour of the lessee and all persons deriving title under him: *id.*

(*a*) Sub-s. 11.

(*b*) Sub-s. 14.

(*c*) Sub-s. 15.

(*d*) Sub-s. 12.

(*e*) The effect of these words is that sub-ss. 7 & 8, *supra*, as to covenant, condition of re-entry, and counterpart, do not apply to a parol agreement: Wolstenholme on the Conv. Acts, p. 72 (9th ed.).

(*f*) Sub-s. 17.

mortgagor under this section, the mortgagee, on giving notice to the tenant of the mortgage and of his intention to exercise his rights under it, is entitled to enforce the covenants and conditions in the lease in the same manner as if he had been a party to it, and that such right cannot be affected by any collateral agreement between the lessor and the lessee (*g*). On the other hand, the lease will be binding on the mortgagee and all persons claiming under him just as if he had joined in it (*h*). The effect of the statute is to give to the mortgagor a power (which he had not before) to carve out of the estate of the mortgagee a term of years which he can grant to his lessee, or, in other words, to make the estate which is at the time vested in the mortgagee a reversion expectant on the determination of the term of years created by the lease (*i*).

Receivers.—A receiver, who may be appointed by the High Court (*k*), cannot, strictly speaking, make leases of the property intrusted to him without the authority and direction of the Court (*l*); and he should always let on the best terms obtainable (*m*). In practice, however, a receiver is usually permitted, without applying for the sanction of the Court, to make leases for a year or less, or for any term not exceeding three years (*n*). With the sanction of the Court he may demise for terms of years (*o*). But he has no power to transfer the legal estate in the property over which he has been appointed receiver; nor can such a power be given to him by the Court (*p*). Hence leases of such property are usually directed to be made by the person having the legal estate or power of leasing (*o*). A tenancy by estoppel (*g*), however, is created by attornment and payment of rent by the tenant to the receiver (*r*). Where a receiver is appointed by the County Court, as hereafter explained (*s*), under the provisions of the Tithe Act, 1891 (*t*), the occupiers of the lands in respect of which he is appointed are required to attorn tenants to him (*u*).

(*g*) *Municipal, &c., Building Society v. Smith*, 22 Q. B. Div. 70. See p. 440, *post*.

(*h*) *Wilson v. Queen's Club*, [1891] 3 Ch. 522.

(*i*) *Robbins v. Whyte*, [1906] 1 K. B. 125. Throughout the report the year of the lease is given in error as 1882. This would, of course, make the statute inapplicable, as the mortgage was of later and not of earlier date; and moreover the lease would have expired before the date of the surrender. It should be 1892 (see 75 L. J. K. B. 38).

(*k*) Jud. Act, 1873, s. 25 (8). Or by a County Court: see the County Court Rules, 1903, O. 13.

(*l*) *Morris v. Elms*, 1 Ves. 139.

(*m*) *Wynne v. Newborough*, 1 Ves. 164.

(*n*) 1 Seton on Judgments and Orders, 802 (6th ed.).

(*o*) 2 Dan. Ch. Prac. 1443 (7th ed.).

(*p*) Kerr on Receivers, 206 (5th ed.).

(*q*) As to this, see *post*, p. 473.

(*r*) *Evans v. Mathias*, 7 E. & B. 590.

(*s*) *Post*, p. 206.

(*t*) 54 Vict. c. 8.

(*u*) Tithe Rules, 1891, r. 18.

Judgment debtors and creditors.—A debtor, after judgment has been signed against him, may, until registration of the writ of execution (*x*), make a lease of his lands so as to bind his creditor if the latter should afterwards sue out an *elegit* and extend the lands under it (*y*). *A fortiori*, if the tenancy commenced before the date of the judgment the lease will remain valid as against the judgment creditor (*i.e.*, the tenant by *elegit*), inasmuch as the writ and inquisition in such case only operate as an assignment of the reversion (*z*). The tenant by *elegit* himself may make a lease, but at law it will be only co-existent with his interest in the lands, and consequently determinable by payment of the sum for which the lands were originally extended (*a*). The purchaser of a term of years under a writ of *fi. fa.* cannot make a valid lease of it before actual assignment from the sheriff, since until such assignment the term remains vested in the debtor (*b*).

Agents.—An agent may make leases on behalf of his principal (*c*). Where a lease is required by statute to be by deed (*i.e.*, when the term exceeds three years) (*d*), his authority to execute it, which formerly in the case of such a lease need only have been “by writing” (*e*), must now also be under seal (*f*); but where this is not the case the agent’s authority need not be by deed or even in writing (*g*). A lease executed by an agent acting under a power of attorney will effectually bind his principal (*h*). It was formerly requisite for its validity that the execution should be in the name of the principal, and not merely in the name of the attorney (*i*); but this is no longer the case (*k*). If an agent execute a lease or an agreement for a lease in his own name only, the rule applies which applies to other contracts, that he is *primâ facie* deemed to be personally bound,—a presumption which is not rebutted by the fact that throughout the body of the document he has described himself as agent for another (*l*),—and in order to prevent this liability from attaching it must be apparent from the other portions

(*x*) Formerly such a lease was valid until the lands were actually delivered in execution: see 27 & 28 Vict. c. 112, s. 1.

(*y*) See *post*, p. 450.

(*z*) *Doe v. Wharton*, 8 T. R. 2. See *post*, p. 449.

(*a*) 1 Platt on Leases, 122.

(*b*) *Id.*, 123. See p. 447, *post*.

(*c*) *Hamilton v. Clanricarde*, 1 Bro. P. C. 341.

(*d*) 8 & 9 Vict. c. 106, s. 3. *Ante*, p. 10.

(*e*) 29 Car. 2, c. 3, s. 1.

(*f*) *Berkeley v. Hardy*, 5 B. & C. 355.

(*g*) *Clinan v. Cooke*, 1 Sch. & L. at p. 31; *Heard v. Pilley*, L. R. 4 Ch. 548.

(*h*) *Hamilton v. Clanricarde*, *supra*.

(*i*) *Combes's case*, 9 Co. at p. 77 a; *Frontin v. Small*, 2 Str. 705.

(*k*) 44 & 45 Vict. c. 41, s. 46.

(*l*) *Tanner v. Christian*, 4 E. & B. 591; *Norton v. Heron*, Ry. & M. 229. See, further, *Chapman v. Smith*, [1907] 2 Ch. 97.

of the document that he did not intend to bind himself as principal (*m*). If a person, on the other hand, executes a lease professedly as agent for another, and it afterwards appears that he was not authorized to do so, so that the principal is not bound, he incurs a personal liability himself, inasmuch as he is held by implication to warrant his authority (*n*); such liability, however, is restricted to the damage resulting, in the ordinary course, from his wrongful act (*o*). But where the agent has purported to act on his behalf the principal may always ratify his acts (*p*), and for this purpose writing is unnecessary (*q*). And an agent's authority, though created by deed, may be revoked without deed (*r*). It seems doubtful whether an agent with authority to let can bind his principal by a stipulation that a person entering as tenant at will shall be entitled to call for a lease at his pleasure (*s*).

A mere bailiff cannot lease his employer's lands otherwise than at will, but a power can be conferred upon him for the purpose (*t*). A farm bailiff, with authority to let from year to year on usual terms (known to the landlord), has no implied authority to let on terms unusual and unknown to him (*u*). Nor has the steward of an estate authority to grant leases for terms of years, at least where this is done contrary to the directions of the landlord (*v*). But if he be empowered by deed to manage property, he has authority to enter into agreements for leases of the nature customary in the neighbourhood where it is situated (*x*). The duty of an agent employed to let a house is only to find persons willing to contract, and he has *ipso facto* no authority to enter into contracts himself (*y*); but, of course, evidence of express authority may be given (*z*).

Trustees in bankruptcy.—By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), it is provided (*a*) that on the appointment of a trustee the property of the bankrupt—which comprises the capacity to exercise all such powers over property as might have been exercised

(*m*) Notes to *Thomson v. Darnport*, 2 Sm. L. C. at p. 400.

(*n*) *Collen v. Wright*, 8 E. & B. 617.

(*o*) *Pow v. Davis*, 1 B. & S. 220; *Spedding v. Nevell*, L. R. 4 C. P. 212.

(*p*) *Fitzmaurice v. Bayley*, 6 E. & B. 868. (The decision was subsequently reversed on another point: see 9 H. L. C. 78.)

(*q*) *Rodwell v. Eden*, 1 F. & F. 542.

(*r*) See *R. v. Wait*, 11 Price, 518.

(*s*) *Ramsden v. Dyson*, L. R. 1 H. L. 129.

(*t*) 1 Platt on Leases, 390.

(*u*) *Turner v. Hutchinson*, 2 F. & F. 185.

(*v*) *Collen v. Gardner*, 21 Beav. 540.

(*x*) *Peers v. Sneyd*, 17 Beav. 151. Cp. *In re Pearson*, [1899] 2 Q. B. 618.

(*y*) *Thuman v. Best*, W. N. 1907, p. 170.

(*z*) See *Slack v. Crewe*, 2 F. & F. 59.

(*a*) Sect. 54.

by the bankrupt for his own benefit (*b*)—vests in the trustee. And the trustee is expressly authorized to exercise any powers (including, therefore, the power of leasing), the capacity to exercise which is vested in him under the Act, and to execute any instruments for carrying into effect the provisions of the Act (*c*).

Liquidators.—Liquidators under the Companies Act, 1862 (*d*), appointed on a voluntary winding-up (*e*): and liquidators under the Companies (Winding-up) Act, 1890 (*f*), subject to the control of the Court (*g*)—may grant leases of property committed to their care (*h*).

SECT. 2.—LESSEES.

In general, all persons whatsoever may take leases. A few observations are subjoined on certain special kinds of lessees. With regard to persons under disability, the general principle is that leases to them are valid, but may be avoided by them upon the disability ceasing.

Infants.—An infant may take a lease, and such a lease is *prima facie* binding both upon him and upon the lessor (*i*). It is, however, voidable by him upon his attaining his majority (*k*), or within a reasonable time afterwards (*l*). Notice of the intention to avoid must be given unless the lessor has dispensed with it by his conduct (*l*). The question as to what is a reasonable time is one to be decided by reference to all the circumstances of the case; but in computing it the fact that the infant has remained unaware of the nature of the obligations into which he has entered, or of his right to avoid them, cannot be taken into consideration (*m*). If he repudiate before he attains his majority, the estate is suspended

(*b*) Sect. 44.

(*c*) Sect. 56, sub-s. 4.

(*d*) 25 & 26 Vict. c. 89.

(*e*) Sect. 133.

(*f*) 53 & 54 Vict. c. 63.

(*g*) Sect. 12, amending 25 & 26 Vict. c. 89, s. 95.

(*h*) *In re Economic Benefit Society*.

cited Palmer's Comp. Prec., Part II., p. 391 (9th ed.).

(*i*) See *Williams v. Taperell*, 8 T. L. R. 241.

(*k*) *Ketsey's case*, Cro. Jac. 320; *Valentini v. Canali*, 24 Q. B. D. 166.

(*l*) See *Holmes v. Blogg*, 8 Taunt. 35.

(*m*) See *Carter v. Silber*, [1892] 2 Ch. 278. Affd., H. L., sub nom. *Edwards v. Carter*, [1898] A. C. 360.

but not avoided, because such repudiation may be again recalled on his attaining that age (*n*). But where he does not repudiate the lease he may be sued upon it even during his minority (*o*), unless, perhaps, it be one obviously to his disadvantage (*p*). If upon attaining full age he do not avoid it, it remains good, and he will thereupon become liable both for current rent (like any other tenant), and also for any arrears which may have accrued due during his infancy (*q*), and this even if the lease be disadvantageous to him (*r*).

If, on the other hand, he elect to avoid the lease, it seems that he is free from liability in respect of rent which has not fallen due at the time he repudiates (*s*), but not in respect of rent which has actually accrued due before such repudiation (*t*): his liability depending not on contract alone (otherwise by repudiating the contract he could annul its obligations) (*u*), but on his position as "purchaser of an interest in a subject of a permanent nature with certain obligations attached to it" (*x*). But he cannot in such event recover any premium he may have given for the lease (*y*): unless he has really received nothing in return for his money (*z*), or nothing beyond what is to be referred to a merely collateral agreement between the parties (*a*). The mere fact of demise, for instance, without actual enjoyment under it, would probably not be sufficient to prevent him from recovering it (*b*). But where an infant, after entering into an agreement to become tenant of a house and to pay a certain sum for the furniture, occupied the house for a certain time on paying part of such sum, it was held that on repudiating the contract he was not entitled to recover what he had so paid (*c*); and this in spite of the Infants' Relief Act, 1874 (*d*), which provides (*e*) that contracts entered into by infants for goods supplied shall be "absolutely void."

(*n*) See per Parke, B., in *L. & N. W. Ry. Co. v. M^rMichael*, 5 Exch. 114.

(*o*) *Kelly v. Coote*, 5 Ir. Com. L. Rep. 469.

(*p*) Pollock on Contracts, p. 67 (7th ed.).

(*q*) Bac. Ab. Infancy and Age (I. 8).

(*r*) *L. & N. W. Ry. Co. v. M^rMichael*, *ubi sup.*

(*s*) *Kelsey's case*, *supra*.

(*t*) *Blake v. Concanon*, 4 Ir. Rep. C. L. 320.

(*u*) *Id.*, per Pigot, C. B.

(*z*) Pollock on Contracts, *ubi sup.* The doctrine of "necessaries" has therefore (it is submitted) no application

to the subject of tenancies: see, however, *Lowe v. Griffith*, 1 Scott, 458.

(*y*) *Holmes v. Blogg*, 8 Taunt. 508.

(*x*) See *Corpe v. Ocerton*, 10 Bing. 252.

(*a*) See *Everett v. Wilkins*, 29 L. T. 846, where the value of the benefits so received was, upon the infant recovering his outlay, ordered to be repaid by him.

(*b*) See per Stirling, J., in *Hamilton v. Vaughan-Sherrin, &c., Co.*, [1894] 3 Ch. 589.

(*c*) *Valentini v. Canali*, 24 Q. B. D. 166.

(*d*) 37 & 38 Vict. c. 62.

(*e*) Sect. 1.

The disability being for the personal benefit of the infant alone (*f*), the lessor can in no case avoid the lease. Where, however, a lease was obtained by an infant upon a false representation that he was of full age, the Court, on application by the lessor, directed it to be set aside and possession to be given up, but refused to allow, as inconsistent with such relief, a claim for compensation for the time the infant had been in occupation (*g*). Leases to infants may be surrendered and renewed under the direction of the Chancery Division of the High Court (11 Geo. 4 & 1 Will. 4, c. 65 (*h*)), an Act which applies even though the infant's interest be merely a beneficial one, the legal estate being vested in a trustee (*i*).

Married women.—The same general principle applies here also. A married woman may by the common law take a lease, and it will vest in her until her husband dissents (*k*); but it is always voidable by him, and after his death by her and her heirs (*l*). If a lease be made to husband and wife jointly, and after the husband's death the wife agree to it, she will be liable both for current rent and for any arrears which may have accrued during the coverture (*m*). Where a married woman (living apart from her husband) who was possessed of separate property entered into an agreement to take a lease, it was held that she was bound by it, as regards rent accrued due in respect of actual occupation, to the extent of her separate property (*n*). And now, by the Married Women's Property Act, 1882, a married woman may enter into contracts, and may also acquire and hold any property as her separate property in the same way as if she were a *feme sole* (*o*), and consequently, whether married before or after that year, has an unlimited right to take leases. Apart from this statute, leases to married women, like those made to infants, may be surrendered and renewed under the direction of the Chancery Division of the High Court (*p*).

Persons of unsound mind, &c.—In accordance with the same general principle, a person of unsound mind is not prevented

(*f*) See *Ex parte Grace*, 1 B. & P. 376.

(*g*) *Lemprière v. Lange*, 12 Ch. D. 675.

(*h*) Sect. 12. As to the mode of application to the Court, see R. S. C. 1883, O. 55, r. 2 (9).

(*i*) *In re Griffiths*, 29 Ch. D. 248.

(*k*) *Swaine v. Holman*, Hob. 203.

(*l*) Co. Lit. 3a.

(*m*) Com. Dig. Baron and Feme (S. 2).

(*n*) *Gaston v. Frankum*, 16 Jur. 507, reversing decree of V.-C., 2 De G. & S. 561.

(*o*) 45 & 46 Vict. c. 75, s. 1, sub-s. 1.

2. See p. 44, *ante*.

(*p*) 11 Geo. 4 & 1 Will. 4, c. 65, s. 12.

thereby from taking a lease (*g*), but such lease is voidable by him in the same way as a lease made *by* him (*r*). If such unsoundness, however, was unknown to the lessor (*s*), and no advantage was taken of the lunatic's incapacity, he will not be permitted to avoid it, and *à fortiori* where the contract has been in part executed, so that the parties cannot be restored to their original position (*t*). Leases granted to a lunatic (*u*) may, under the direction of the Judge in lunacy (*x*), and subject to such terms and conditions as he may approve (*y*), be surrendered and renewed by his committee (*z*). Such renewed lease must be to the same uses and be subject to the same trusts and conditions as the surrendered lease was, or would but for the surrender have been, subject to (*a*). Fines or other payments on the renewal of leases may be paid out of the lunatic's estate or charged with interest on the leasehold property (*b*).

Leases made to persons under duress or in a state of intoxication follow the same rule. As regards leases to the administrator of the property of convicts, see 33 & 34 Vict. c. 23, s. 12 (*c*).

Joint tenants and Tenants in common.—If a lease be granted to two or more persons they hold as joint tenants, and upon the death of one of them the other or others will become entitled by survivorship to the whole at law (*d*). If, however, the lease be one taken by partners as part of the partnership property (*e*), or as merely accessory to the trade in which they have embarked (*f*), or the property be worked by them as a joint speculation (*g*), or money have been expended by them upon it in the way of trade (*h*), or the purchase-money have been contributed by them in unequal shares (*i*), equity formerly (and now the High Court follows the rule generally) regarded them not as joint tenants but as tenants in common, and held the survivor a trustee for the representatives of his deceased partner so far as the latter's share was concerned (*j*).

(*g*) Co. Lit. 2 b.

(*r*) See *ante*, p. 44.

(*s*) *Dane v. Kirkwall*, 8 C. & P. 679.

(*t*) See Pollock on Contracts, p. 94 (7th ed.).

(*u*) 53 Vict. c. 5, s. 116.

(*x*) Sect. 108.

(*y*) Sect. 122, sub-s. 2.

(*z*) Sect. 120.

(*a*) Sect. 121.

(*b*) Sect. 122, sub-s. 3.

(*c*) *Ante*, p. 46.

(*d*) Litt. s. 280; 1 Platt on Leases, 537.

(*e*) *Lake v. Gibson*, 2 Wh. & Tud. L. C. 952 (7th ed.).

(*f*) *Elliot v. Brown*, 3 Swanst. 489, n.

(*g*) *Lake v. Gibson*, *supra*.

(*h*) *Lyster v. Dolland*, 1 Ves. 431, per Lord Thurlow, L. C.; *Jeffereys v. Small*, 1 Vern. 217.

(*i*) *Lake v. Gibson*, *supra*, per Jekyll, M. R.

(*j*) See 2 Wh. & Tud. L. C. pp. 957 *et seq.*; and see now 53 & 54 Vict. c. 39, ss. 20 (2), 46.

Corporations.—A corporation may take a lease, but only by instrument under its common seal (*k*). (But companies incorporated under the Companies Acts may enter into contracts to accept leases, if *intra vires*, and those contracts may be made on their behalf in writing signed by any person under their express or implied authority (*l*.) Such a lease, however, must in general comply with the provisions of the Mortmain Act (*m*), which expressly extends to the case of a lease (*n*), and which (under pain of forfeiting the land to the Crown as from the date of the lease) requires a licence from the Crown or by statute as a condition to the validity of every assurance of land to "any corporation in mortmain" (*o*), except where such assurance is of lands for certain specified public objects (*p*). If a licence be obtained the lease is not restricted as to length (*q*). It has been held that short leases, *e.g.*, leases for fourteen years, are not within the Act (*r*); though where the exact line should for this purpose be drawn appears to be a matter of some doubt (*s*). Nor do the restrictions on the power of municipal corporations to acquire land which are contained in the Municipal Corporations Act, 1882 (*t*), apply to short leases of the kind just adverted to (*r*).

Leases granted to a corporation aggregate go in succession because the corporation never dies, but it is otherwise with those granted to a corporation sole (*u*). Thus, a lease for years made to a bishop and his successors goes upon the bishop's death not to his successor but to his executors (*v*), except by special custom (*w*). But a corporation sole cannot make a lease to himself in his individual capacity, nor can one member of a corporation aggregate make a lease of its property to another, *e.g.*, a dean to his chapter (*x*).

Incumbents of benefices and all spiritual persons licensed to perform the duties of any ecclesiastical office are restrained from taking leases, for purposes of occupation, of more than eighty acres of farming land without the written consent of their diocesan,

(*k*) *Finlay v. Bristol and Exeter Ry. Co.*, 7 Exch. 409.

(*l*) 30 & 31 Vict. c. 181, s. 37. See a similar section in the Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), s. 97.

(*m*) 51 & 52 Vict. c. 42. See p. 71, *infra*.

(*n*) Sect. 10.

(*o*) Sect. 1.

(*p*) Sect. 6, amended by 55 Vict. c. 11.

(*q*) Sect. 2.

(*r*) *Truro Corporation v. Rowe*, [1901] 2 K. B. 870, per Wills, J. The judgment was varied on appeal ([1902] 2 K. B. 709), but this point was not affected.

(*s*) See Tudor on Charities, p. 429 (4th ed.).

(*t*) 45 & 46 Vict. c. 50, ss. 105, 107.

(*u*) Bac. Ab. Corporations (E. 4).

(*v*) Co. Lit. 46 b.

(*w*) 2 Black. Comm. 432.

(*x*) *Sutler v. Grosvenor*, 8 Mod. 303.

and such consent, if given, is only to be for terms not exceeding seven years (*y*).

Trustees of charities.—Trustees for charitable uses may also take leases, but such leases must be in accordance with the provisions of the Mortmain Act (*z*), otherwise they will be void (*a*), i.e., not voidable only, but absolutely void (*b*). The principal of these provisions are, that the lease be by deed, executed in the presence of two or more witnesses (*c*), twelve months at least (unless made in good faith for full and valuable consideration) before the death of the grantor (*d*), and inrolled in the Supreme Court within six months of its execution (*e*): that it be made to commence and take effect in possession immediately from the making thereof (*f*): and that it be made without any power of revocation or reservation (*g*) for the benefit of the grantor or of any person claiming under him (*h*). A deed executed collusively for the purpose of evading the statute is void as against the heir of the grantor (*i*). The Act, however, contains certain exemptions in favour of leases or other assurances of land which are made for public purposes, as for the establishment of a park, school, or museum (*k*), or for the promotion of religion, education, art, literature, or science (*l*). And a further exemption has been created in the case of assurances of lands for the purpose of providing dwellings for the working classes in populous places (*m*).

Trustees in general.—A trustee in the administration of trust property may take a lease, and if he does he is liable upon its covenants in the same way as if he had the beneficial enjoyment (*n*). The lessor's only remedy under the lease is against him, and he has none against the *cestui que trust* (*o*), though an account at his suit has been decreed against the latter as equitable

(*y*) 1 & 2 Vict. c. 106, s. 28.

(*z*) 51 & 52 Vict. c. 42.

(*a*) Sect. 4, sub-s. (1); *Bunting v. Sargent*, 13 Ch. D. 330.

(*b*) *Churcher v. Martin*, 42 Ch. D. 312.

(*c*) See *Wickham v. Marquis of Bath*, L. R. 1 Eq. 17.

(*d*) Sect. 4, sub-s. (7).

(*e*) *Id.*, sub-s. (9).

(*f*) *Id.*, sub-s. (2); *Webster v. Southey*, 36 Ch. D. 9.

(*g*) Subject to certain exceptions specifically mentioned in the Act; sect. 4, sub-s. (4).

(*h*) *Id.*, sub-s. (3); *Webster v. Southey*, *supra*.

(*i*) *Doe v. Lloyd*, 5 Bing. N. C. 741.

(*k*) Sect. 6, amended by 55 Vict. c. 11.

(*l*) Sect. 7.

(*m*) 53 & 54 Vict. c. 16. All these exemptions are subject to certain conditions, for which the Acts themselves must be referred to.

(*n*) See *White v. Hunt*, L. R. 6 Ex. 32 (where the trustee took from the lessee by assignment).

(*o*) *Walters v. Northern Coal Co.*, 5 D. M. & G. 629.

lessee of the land (*p*). But the trustee can look to the trust estate to indemnify him in equity (*q*), even where, as in the case of a club, the members are not personally liable (*r*). In conformity with the above principle, where a lease purporting to be granted in consideration of a sum of money, paid out of her separate estate by his wife, was made to a person who expressly declared therein that he held the premises in trust for her as part of that separate estate, it was decided, after the death of the husband intestate (no letters of administration having been taken out to him), that the wife, in the absence of evidence showing that she had become executrix *de son tort*, was not liable on the covenants of the lease, although she had throughout had the beneficial interest therein and enjoyed the occupation, and had paid the rent and performed the covenants which he or his estate was liable to pay or perform (*s*).

Agents.—An agent or steward may take a lease from his principal or employer; but agreeably to the rule already stated (*t*), he will be bound to make out that he gave the full consideration which it would have been his duty to obtain from a stranger (*u*). He is bound to show that full information has been imparted, and that the agreement has been entered into with perfect good faith (*v*). Inadequacy of consideration in such cases is always evidence of fraud (*x*).

Public bodies (under special statutes).—There are a variety of Acts scattered through the statute-book enabling bodies established for public or quasi-public purposes to take and hold land on lease. For instance, leases may be taken of lands or buildings by parish officers on behalf of the inhabitants of the parish (*y*): by councils of boroughs and commissioners of public baths and wash-houses (*z*): by library authorities under the Public Libraries Act (*a*): by the

(*p*) *Wright v. Pitt*, L. R. 12 Eq. 408. See this case explained in *Ramage v. Womack*, *infra*; and cf. *post*, p. 415.

(*q*) *Lewin on Trusts*, p. 260 (11th ed.).

(*r*) *Wise v. Perpetual Trustees Co.*, [1903] A. C. 139.

(*s*) *Ramage v. Womack*, [1900] 1 Q. B. 116.

(*t*) *Ante*, p. 46.

(*u*) *Selsey v. Rhoades*, 2 S. & S. 41; *affd.*, 1 Bli. N. S. 1.

(*v*) *Molony v. Kernan*, 2 Dru. & War.

31; *Ormond (Lady) v. Hutchinson*, 16 Ves. 94.

(*x*) *Gartside v. Isherwood*, 1 Bro. C. C. 558; *Harris v. Tremenheere*, 15 Ves. 34.

(*y*) 59 Geo. 3, c. 12, s. 12. See on this statute *ante*, p. 54.

(*z*) 9 & 10 Vict. c. 74, s. 27, amended by 45 & 46 Vict. c. 30, s. 3.

(*a*) 55 & 56 Vict. c. 58, s. 11. As to the application of this and of other Acts cited under this head to rural parishes by the Local Government Act, see 56 & 57 Vict. c. 73, s. 7.

ratepayers of a parish for the purpose of public improvements (*b*): by overseers of populous parishes for the erection of offices for the transaction of their business (*c*): by guardians for the purpose of the relief of the poor and their own use (*d*): by trustees of friendly societies, if the rules of the society so provide (*e*): by local authorities for the purposes of the Public Health Act (*f*), and for providing lodging-houses for the working classes (*g*): by county councils for the purpose of their powers and duties (*h*), and of letting small holdings (*i*): and by district councils (*k*) and parish councils (*l*) for the purpose of letting allotments. In all such cases there are imposed various conditions and restrictions, for the details of which the Acts themselves must be consulted.

CHAP. I.—THE LEASE (*continued*).

DIV. II.—THE DEMISE.

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Words of demise.—The usual words of demise are “demise” or “lease,” but any words sufficient to explain the intention of the parties that the one shall divest himself of the possession, and the other come into it for a determinate time, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years, as effectually as if the most proper and pertinent words had been made use of for that purpose (*m*). Where, for instance, a

(*b*) 23 & 24 Vict. c. 80, s. 1. Apart from statute, no lease can be made to the inhabitants of a parish generally, they not being a corporate body; Shep. Touch. 237.

(*c*) 24 & 25 Vict. c. 125, s. 1.

(*d*) 30 & 31 Vict. c. 106, s. 13.

(*e*) 59 & 60 Vict. c. 25, s. 47.

(*f*) 38 & 39 Vict. c. 55, s. 175.

(*g*) 53 & 54 Vict. c. 70, s. 57. As to leases for a similar purpose by local authorities, see 63 & 64 Vict. c. 59, s. 5.

(*h*) 51 & 52 Vict. c. 41, s. 65.

(*i*) 55 & 56 Vict. c. 81, s. 2.

(*k*) 50 & 51 Vict. c. 48, s. 2 (1), as affected by 56 & 57 Vict. c. 73: see ss. 21, 25 of the latter Act.

(*l*) 56 & 57 Vict. c. 73, s. 10 (1). Parish councils have also power to “provide or acquire” land and buildings for the transaction of their business: sect. 8 (1).

(*m*) Bac. Ab. Leases (K.).

person mortgaged land in fee, with a proviso for redemption on payment of the principal at a certain date, and it was further stipulated that the mortgagee should not, if the interest were duly paid, call in the principal for seven years, and that the mortgagor should hold the premises for his own use till default, it was held that this operated as a re-demise of the premises by the mortgagee to the mortgagor for the term of seven years (*n*). So a document in the following terms—"We hereby agree to let you keep peaceable possession of your present house . . . for a term of ten years, on condition that you commit no nuisance, and pay" a specified sum "per week for rent," and containing a further stipulation for payment by the person addressed of certain rates usually made for a period of six or twelve months in advance and not ordinarily borne by weekly tenants—enures, not as a mere licence or as a weekly tenancy, but as a lease, binding both parties and their assignees, for a term of ten years (*o*).

Difference between leases and agreements.—It was formerly often a matter of considerable importance to decide whether the instrument containing the contract between landlord and tenant amounted to an actual lease, or whether it was only an agreement for a lease to be afterwards made. For reasons which have already been given (*p*), the question—so far at least as those agreements are concerned of which specific performance may be granted (*q*)—is no longer of so much moment. The distinction, however, between the two classes of instruments must not be altogether overlooked, for, as will be pointed out hereafter, there are agreements of which specific performance will not be given; and even where that remedy is available, the tenant holding under a mere agreement is not, as already mentioned (*r*), *for all purposes* on the same footing as one holding under an actual lease. Moreover, the question may be important with regard to the Statute of Frauds (*s*). It has, too, already been pointed out (*t*) that before entry a person holding an actual lease has an interest in the land which gives rights of action against persons not parties to the contract—rights, of course, which do not enure to one holding only an agreement.

(*n*) *Wilkinson v. Hall*, 3 Bing. N. C. 508.

(*o*) *Duxbury v. Sandiford*, 80 L. T. 552.

(*p*) *Ante*, pp. 13 *et seq.*

(*q*) As to this, see pp. 345 *et seq.*, *post*.

(*r*) *Ante*, p. 17.

(*s*) *E.g.*, an actual letting, inoperative as an agreement under sect. 4, may be saved by sect. 2; *ante*, p. 10. See *Edge v. Strafford*, 1 C. & J. 391.

(*t*) *Ante*, p. 20.

The most general rule applicable in deciding the question is that the intention of the parties, as declared by the words of the instrument, must govern the construction (*u*); and where there is an instrument, containing all the material terms of the letting (*x*), by which it appears that one party is to give possession and the other to take it, that is a lease (*y*), unless it can be collected from the instrument itself (*i.e.*, without reference to extrinsic circumstances or subsequent acts of the parties) (*z*), that it is an agreement only for a lease to be afterwards made (*a*). Nor will the fact that it contains a stipulation that a lease shall—or at the tenant's request may (*b*)—be afterwards drawn up of itself prevent that result, for such a clause may amount only to an agreement between the parties that a more formal document should subsequently be executed in order to carry out their object in a more satisfactory manner (*c*). For this, however, immediate possession must be contracted for (*d*), and the terms of the future lease must be capable of being ascertained at the time of entering into the agreement (*e*). It follows from the general principle, that where the instrument contains an express stipulation that it shall not operate as a lease (*f*): or where it appears on the face of the instrument that the supposed lessor had no power at the time of its execution to grant a lease (*g*): or that it was doubtful in whose name as lessor the demise ought to be made (*h*): or that the parties contemplated that something ulterior—not being merely accessory to the subject of demise (*i*)—should be done before the actual relation of landlord and tenant should be created between them (*k*): or where it leaves certain material points to be afterwards settled (*l*), *e.g.*, the time when the tenancy is to commence (*m*), or its duration (*n*), or the

(*u*) *Doe v. Ashburner*, 5 T. R. 163; *Poole v. Bentley*, 12 East, 168.

(*x*) *Wright v. Tresevant*, Moo. & M. 231. Cp. *Doe v. Groves*, 15 East, 244.

(*y*) *Curling v. Mills*, 6 M. & Gr. 173.

(*z*) *Doe v. Powell*, 7 M. & Gr. 980.

(*a*) *Morgan v. Bissell*, 3 Taunt. at p. 67, per Lawrence, J.

(*b*) *Wilson v. Chisholm*, 4 C. & P. 474.

(*c*) *Maldon's case*, Cro. Eliz. 33; *Harrington v. Wise*, *id.*, 486; *Barry v. Nugent*, 3 Doug. 179; *Baxter v. Broune*, 2 W. Bl. 973; *Pinero v. Judson*, 6 Bing. 206; *Chapman v. Bluck*, 4 Bing. N. C. 187; *Alderman v. Neate*, 4 M. & W. 704; *Doe v. Benjamin*, 9 A. & E. 644. Cf. p. 351, *post*.

(*d*) See *Tempest v. Rawling*, 13 East, 18.

(*e*) *Doe v. Ries*, 8 Bing. 178.

(*f*) *Perring v. Brook*, 7 C. & P. 360; *Brook v. Biggs*, 2 Bing. N. C. 572.

(*g*) *Hayward v. Haswell*, 6 A. & E. 265.

(*h*) *Doe v. Foster*, 3 C. B. 215.

(*i*) *Staniforth v. Fox*, 7 Bing. 590.

(*k*) *Jones v. Reynolds*, 1 Q. B. 506; *Doe v. Clarke*, 7 Q. B. 211; *Marshall v. Berridge*, 19 Ch. Div. 233; *Swain v. Ayres*, 20 Q. B. D. 585; *affd.*, 21 Q. B. Div. 289.

(*l*) *Chapman v. Towner*, 6 M. & W. 100.

(*m*) *Dunk v. Hunter*, 5 B. & A. 322.

(*n*) *Clayton v. Burtenshaw*, 5 B. & C. 41. The instrument here was under seal.

amount of the rent (*o*), or the time at which it is to become due (*p*):—in all these cases the instrument can only operate at most as an agreement (*q*).

CHAP. I.—THE LEASE (*continued*).

DIV. III.—THE PARCELS.

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Description of the premises.—The lease should, in that part of it usually known as "the parcels," describe the premises demised with certainty. Sometimes qualifying expressions are added, *e.g.*, "containing 100 acres *more or less*," or "thereabouts," but such expressions will only cover a reasonable deviation from the description (*r*). The time to which the description is to be referred, in order to decide what falls within it, is *primâ facie* the date of the demise (*s*). In this, as in similar matters, the intention of the parties, if it can be ascertained, is to be followed; and, in order to ascertain it, not only must the subject-matter, *i.e.*, the nature and locality of the property demised be considered (*t*), but the whole scope of the instrument must be looked to—including for

(*o*) *John v. Jenkins*, 1 Cr. & M. 227.

(*p*) *Dunk v. Hunter*, *supra*.

(*q*) *Dav. Prec. Conv.* vol. 5, pt. 1, pp. 7—14 (3rd ed.). Most of the cases on the subject will be found collected in 1 *Platt on Leases*, pp. 582—611.

(*r*) *Day v. Fynn*, *Owen*, 133; *Neale v.*

Parkin, 1 Esp. 229; *Davis v. Shepherd*, L. R. 1 Ch. 410.

(*s*) *Crisp v. Price*, 5 Taunt. 548; *Korslake v. White*, 2 Stark. 508; *Kooystra v. Lucas*, 5 B. & A. 830.

(*t*) See per *Ashurst, J.*, in *Doe v. Burt*, 1 T. R. 701.

this purpose the recitals (*u*)—and regard paid to the facts existing at the time it was made (*v*). Thus, for instance, although at the time of the lease a thing be temporarily and accidentally severed from the thing demised, it will pass with it, if it be clear that it essentially and necessarily constitutes part of it: *e.g.*, in the demise of a house, the doors will pass though not in their places at the time (*x*). (It may be observed that the word “house” or “messuage,” with a few others, *e.g.*, “farm,” “manor,” &c., has a legal meaning, wider than the ordinary one, which may serve to pass with it, by a grant, an adjoining garden or curtilage if parcel of it (*y*)). So the demise of a flat, or of rooms on a floor, includes the outer walls so far as solely appropriate to the rooms let (*z*). In the same way, anything obviously necessary for the enjoyment of the thing demised will also pass with it (*a*); and in general all things which are on the premises for the purpose of making, and which do make them, fit as premises for the particular purposes for which they are used, will pass by a demise of the premises as such (*b*). This rule will serve to pass fixtures (*c*), unless a contrary intention be shown, *e.g.*, if certain particular articles are enumerated to the exclusion of others (*d*); so that the acceptance of the lease of a house does not raise an implied obligation to pay an additional sum for the fixtures (*e*).

As in all similar cases, in deciding what the intention of the parties was, the principle of estoppel applies; so that where, for instance, land demised is described in the lease as abutting on a road (*f*), or on an intended way (*g*), or on new streets (*h*), the lessor will be estopped from disputing the right of the lessee to treat the land as if bounded in the manner so defined (*i*). On the other

(*u*) *Dee v. Osborne*, 9 L. J. C. P. 313.

(*v*) *Crompton v. Jarratt*, 30 Ch. Div. 298, per Cotton, L. J.; *Chappell v. Mason*, 10 T. L. R. 404.

(*x*) Shep. Touch. 90.

(*y*) Co. Lit. 56 b; *Fenn v. Grafton*, 2 Bing. N. C. 617; notes to *Smith v. Martin*, 2 Wms. Saund. 802 (ed. 1871); Shep. Touch. 91; 3 Byth. & Jar. Conv. 131 (4th ed.).

(*z*) *Carlisle Café Co. v. Muse*, 67 L. J. Ch. 53.

(*a*) Cf. *infra*, p. 82.

(*b*) *Tyne Boiler Works Co. v. Longbenton*, 18 Q. B. Div. 81, per Lord Esher, M. R.

(*c*) *Colegrave v. Dias Santos*, 2 B. & C. 76; *Longstaff v. Meagre*, 2 A. & E. 167.

Cf. now Conv. Act (44 & 45 Vict. c. 41), s. 6 (1) and (2); *infra*, p. 88.

(*d*) *Hare v. Horton*, 5 B. & Ad. 715.

(*e*) *Goff v. Harris*, 5 M. & Gr. 573. For an instance of an action against a lessor for removing fixtures between the date of the agreement for a lease and that of delivery of possession, see *Sachs v. Henderson*, [1902] 1 K. B. 612.

(*f*) *Roberts v. Karr*, 1 Taunt. 495; *International Tea Stores Co. v. Hobbs*, [1903] 2 Ch. 165.

(*g*) *Harding v. Wilson*, 2 B. & C. 96; *Gogarty v. Hoskins*, [1906] 1 I. R. 173.

(*h*) *Espley v. Wilkes*, L. R. 7 Ex. 298.

(*i*) See *Furness Ry. Co. v. Oumberland Building Society*, 52 L. T. 144; *Cooke v. Ingram*, 68 L. T. 671; *Mellor v. Walmsley*, [1905] 2 Ch. 164.

hand, the mere description of lands in a lease as being of a certain nature (*e.g.*, as meadow) will not estop the parties from showing that at the time of the demise they were, in reality, of a different kind (*k*).

The fact that a right of way over a piece of ground adjoining the demised premises is given by the lease to the tenant is not inconsistent with the soil in a particular portion of it passing to him by the demise (*l*). The grant of a right of way in a lease must always be construed (in deciding whether it be general or only restricted, *e.g.*, a footway, horseway, &c.), by regard both to the nature of the road over which it is granted and the purpose for which it is intended to be used (*m*). Where such a right was granted "at all reasonable times," it was held that the question what was a reasonable use was one of fact for a jury (*n*). The grant (in a lease) of a right of way to premises which at a subsequent period are lawfully used as a workmen's club extends to all persons lawfully going to and from the club; and the fact that such grant is in terms made to the lessee, "his executors, administrators and assigns, undertenants and servants," will not prevent it from applying to all licensees of the grantee (*o*). And although a grant may not be enlarged by reference to subsequent words employed in the instrument, it is legitimate to refer to those words for the purpose of explaining the terms of the grant (*p*).

Occasionally leases, to ensure a proper supply of water to the premises, specifically demise with them certain rights in regard to water; but where premises with two ponds situate therein were demised, together with the right to the water in the ponds and in the streams leading thereto, it was held that water percolating discontinuously through earthy strata, not being properly described as "streams," could be drawn off by the lessor from adjoining ground, although it would, if not so drawn, have found its way eventually into one of the ponds (*q*).

(*k*) *Skipworth v. Green*, 8 Mod. 311.

(*l*) *Ourling v. Mills*, 6 M. & Gr. 173.

(*m*) *Cannon v. Villars*, 8 Ch. D. 415; *Cousens v. Rose*, L. R. 12 Eq. 366. Cf. *Milner's Safe Co. v. G. N. & City Ry. Co.*, [1907] 1 Ch. 208 (case of implied grant).

(*n*) *Hawkins v. Carbine*, 27 L. J. Ex. 44.

(*o*) *Bazendale v. North Lambeth Liberal Club*, [1902] 2 Ch. 427.

(*p*) *Thornton v. Little*, 23 T. L. R. 357, where the grant of a footway to a person

and her assigns as lessees or owners of certain premises, and to her and their tenants, visitors, and servants, was held (where a school was being carried on) to extend to its user by pupils, in consequence of words being added stating that the intent was that the way should be appurtenant to the premises for all purposes connected with their use and enjoyment.

(*q*) *M'Nab v. Robertson*, [1897] A. C. 129.

Where lands are demised which are separated from a highway only by waste land, the latter will be presumed to pass with them (*r*), but this presumption may be rebutted by the terms of the demise itself (*s*). Where a lease was made of lands containing a specified number of acres, arable, meadow, and pasture, and situate within defined boundaries, it was held that upon its renewal on the same terms bog land and land reclaimed from bog, situate within those boundaries, passed also (*t*).

Any description is ordinarily sufficient which clearly points out what is intended to be demised; and parcel or no parcel being a question of fact (*u*), parol evidence in cases of doubt or difficulty is admissible to show what the intention was (*x*), unless its object be to contradict the plain meaning of the written instrument (*y*). But if all the terms of description fit some particular property, they cannot be enlarged by extrinsic evidence so as to include anything which any part of those terms does not accurately fit (*z*). Thus it has even been held that a grant of all houses, mills, &c., in A. did not pass a mill in B., though it was under the same roof with one which was actually situate in A., and which therefore did pass (*a*).

It not unfrequently happens, however, that different parts of the description are inconsistent with one another (*e.g.*, where a plan incorporated with the deed does not tally with it) (*b*), or that the words of description when they come to be examined do not fit with accuracy any particular property at all; and then a difficulty arises in discovering what the intention really was. The whole of the instrument—explained for this purpose if necessary by extrinsic evidence—must be looked at in order to decide which of such inconsistent descriptions should prevail (*c*). It may be stated as an ordinary rule of construction in such cases, that where premises are

(*r*) *Doe v. Pearsey*, 7 B. & C. 304. See as to the soil of the highway itself when it adjoins demised land, *post*, p. 518.

(*s*) *Kingmill v. Millard*, 11 Exch. 313.

(*t*) *Jack v. McIntyre*, 12 Cl. & F. 151.

(*u*) *Lyle v. Richards*, L. R. 1 H. L. 222; *Manning v. Fitzgerald*, 29 L. J. Ex. 24; *Francis v. Hayward*, 22 Ch. Div. 177, per Jessel, M. R.

(*x*) *Mages v. Larell*, L. R. 9 C. P. 107.

(*y*) *Minton v. Geiger*, 28 L. T. 449.

(*z*) *Hardwick v. Hardwick*, L. R. 16 Eq. 168, per Lord Selborne, L. C.

(*a*) *Hall v. Combes*, Cro. Eliz. 368.

(*b*) See *Llewellyn v. Lord Jersey*, 11 M. & W. 183; *Barton v. Dawes*, 10 C. B. 261; *Mailland v. Mackinnon*, 1 H. & C. 607; *Lyle v. Richards*, *supra*; *Nicholson v. Rose*, 4 Do G. & J. 10, in all of which cases the plan was held to govern the construction: whilst in *Horne v. Struben*, [1902] A. C. 454, the plan was rejected. And see the principle explained by Vaughan Williams, L. J., in *Mellor v. Walmesley*, [1905] 2 Ch. 164.

(*c*) *Hardwick v. Hardwick*, *ubi sup.* (This, like other cases under this head, was one of a devise and not a demise, but the principle is the same.)

described in general terms, and a particular description is afterwards added, the latter will control the former (*d*). Once, however, a sufficient description free from all uncertainty is given, a "false demonstration" subsequently added may always be rejected (*e*); for (as it has been put) once there is a certainty in the thing demised, "another certainty put to a thing which was certain enough before is of no manner of effect" (*f*). And where such certainty is found, the addition of a wrong name, or of an erroneous statement as to quantity, occupancy, or locality, or an erroneous enumeration of particulars may always be disregarded (*g*). Thus, a grant of "the T. farm, now in the occupation of C.," was held to pass everything included under the specific designation of the T. farm, though a portion of it was not in the occupation of C. at all (*h*). In the same way, in a demise of "the meadow called A., containing ten acres," the whole meadow will pass, though in reality it contain twenty acres (*i*). So in a grant of a "freehold farm at E., now in the occupation of B.," where the farm in such occupation was partly copyhold, the word "freehold" was rejected as false demonstration, and the whole was therefore held to pass (*k*). But if the words be open to any other construction, a "false demonstration" will never be presumed (*l*); hence, if there be some portions of the land granted or demised in respect of which all the facts of the description are found to be true, and others in respect of which some of the facts are true and some false, the former alone will pass (*m*). Thus, where a person who had purchased an estate called the A. farm, situated in the parish of R., afterwards acquired adjoining land in the parishes of S. and B. in the same county, a grant of "the A. farm, in the parish of R., in the county of H.," was held not to pass the adjoining land, though the whole land had been thrown together and known generally as the A. farm (*n*).

The application of the maxim "*falsa demonstratio non nocet*" is not confined to cases where the false part of the description follows the true, it being immaterial in what part of the sentence the

(*d*) *Doe v. Galloway*, 5 B. & Ad. 48, per Parke, J.; *Dyne v. Nutley*, 14 C. B. 122.

(*e*) *Doe v. Galloway*, *supra*.

(*f*) *Wrottesley v. Adams*, Plowd. 187, at p. 191.

(*g*) *Cowen v. Truefitt*, [1898] 2 Ch. 551, per Romer, J.; *affil.*, C. A., on another ground, [1899] 2 Ch. 309.

(*h*) *Goodtitle v. Southern*, 1 M. & S. 299.

(*i*) *Shep. Touch.* 248.

(*k*) *In re Bright-Smith*, 31 Ch. D. 314.

(*l*) *Bacon's Law Tracts*, rule 13.

(*m*) See *Morrell v. Fisher*, 4 Exch. at p. 604; *Webber v. Stanley*, 16 C. B. N. S. 698; *Griffiths v. Penson*, 8 L. T. 84; *In re Seal*, [1894] 1 Ch. 316.

(*n*) *Pedley v. Dodds*, L. R. 2 Eq. 819.

"false demonstration" is found (*o*). But where the clear words of a lease apply to something which is non-existent, the principle cannot be invoked in aid of its construction (*p*).

Sometimes the description is by reference to the enjoyment of a prior tenant. Where the wording of the parcels was "all that, &c., situate, &c., *as the same was late in the occupation of, &c.*," it was held, upon the construction of the whole instrument, that the italicized words were words merely of identification (though the premises were capable of being sufficiently identified by reference to other parts of the deed), and that their effect was not to limit the operation of the deed to the user actually had by the late occupier (*q*).

Easements.—In the next place it has to be considered, first, what rights (such as easements) over premises other than those immediately demised are conferred upon a lessee by the demise; and secondly, what rights of that nature are retained by the lessor over the demised premises themselves. The last-mentioned rights are commonly called reservations (*r*).

I. Easements, &c., which pass to the lessee. (Implied grants.)

This question will be best considered under three heads:—

- (A.) When the parcels contain nothing beyond a description of the premises.
- (B.) When, in addition to such description, they contain the word "appurtenances," or some modification thereof.
- (C.) When they contain the ordinary "general words," *i.e.*, formulas of the type "all rights, easements, &c., to the said premises belonging or therewith used, occupied, or enjoyed" (*s*).

As will be presently explained, the Conveyancing Act, 1881 (*t*), has effected a great change in these matters by importing into all leases general words of the most comprehensive character. But inasmuch as the Act only applies to leases made after the year in which it was passed, and to these only so far as a contrary intention may not be expressed in the instrument, it is still necessary to understand the law as it existed before the Act came into force.

(*o*) *Cowen v. Truefitt*, [1899] 2 Ch. 309.

(*p*) *Id.*, per Sir F. Jeune. As to rectification in such a case, see *post*, p. 339.

(*q*) *Martyr v. Lawrence*, 2 D. J. & S. 261.

(*r*) See *infra*, p. 91.

(*s*) See Wms. Real Property, pp. 416, 598 (20th ed.).

(*t*) 44 & 45 Vict. c. 41.

(A.) From early times a grant (*u*) of premises has been held, without express words to that effect, to pass to the grantee easements strictly appurtenant to them (*v*); and this, in the case of a lease, even if it be only by parol (*w*). Such easements are necessarily over the property of some person other than the grantor; for any rights analogous to easements (*i.e.*, rights which but for unity of ownership would have been real easements) which before the grant the grantor may, for the benefit of the part he subsequently grants, have exercised over other property belonging to himself, are held to have been so exercised, not as appurtenant to the portion subsequently granted, but as incident to his ownership of such other property (*x*). These rights are usually called *quasi-easements*.

In addition, however, to easements strictly appurtenant to the property demised, a lessee has always been held entitled to easements necessary to its reasonable enjoyment (usually called *easements of necessity*) (*y*), over other property retained by the lessor. Examples of such easements are (*z*)—the use of a drain (*a*), the use of a coal shoot and water pipes (*b*), the use of an artificial watercourse (*c*), and the right to support (*d*); but the most important of them is a “way of necessity” (*e*), which is a means of approach to the premises granted (where surrounded by other land of the grantor *on all sides* (*f*)), either by an undefined way (*g*), or by such way as may be defined and selected by the grantor (*h*), the selection when once made being final (*i*). And though a way may not physically be a necessity, the law appears to recognise such a thing as a way of “qualified necessity,” *i.e.*, a

(*u*) This includes a lease, and as a lease is a sale *pro tanto*, decisions under this head on sales apply to leases.

(*v*) See Williams, *Real Property*, pp. 415, 416.

(*w*) *Skull v. Glenister*, 16 C. B. N. S. 81.

(*x*) See per Fry, J., in *Bolton v. Bolton*, 11 Ch. D. at pp. 970, 971, and in *Roe v. Siddons*, 22 Q. B. Div. at p. 236.

(*y*) *Pearson v. Spencer*, 1 B. & S. 571; *Polden v. Bastard*, L. R. 1 Q. B. 156, per Erle, C. J.

(*z*) See Gale on Easements, pp. 151 *et seq.* (7th ed.).

(*a*) *Encart v. Cochrane*, 4 Macq. 117.

(*b*) *Hinchliffe v. Lord Kinnoul*, 5 Bing. N. C. 1.

(*c*) *Watts v. Kelson*, L. R. 6 Ch. 166. But the mere fact that there is no water supply on demised premises does not of

course make the right to take water from the adjoining property an easement of necessity: *Kilgour v. Gadder*, 89 L. T. 444 (reversed, C. A., on another point, [1904] 1 K. B. 457).

(*d*) *Shubbrook v. Tufnell*, 46 L. T. 886.

(*e*) *Osborn v. Wise*, 7 C. & P. 761.

(*f*) *Titchmarsh v. Royston Water Co.* W. N. 1899, p. 256, where the *dictum* in the next-cited case to the effect that the circumstance that a claim is to a way over a particular road, without any right of selection on the part of the grantor, is of itself sufficient to show that the way is not one of necessity, is dissented from.

(*g*) *Brown v. Alabaster*, per Kay, J., 37 Ch. D. at p. 500.

(*h*) *Bolton v. Bolton*, 11 Ch. D. 968.

(*i*) *Deacon v. S. E. Ry. Co.*, 61 L. T. 577.

way required for the comfortable and beneficial enjoyment of the premises for the purpose for which they were let (*j*); nor is it necessary, for a way of this kind to be implied in a demise, that it should be indicated by a formed road or track, the lessor in such case being at liberty to mark out any reasonably convenient way (*k*). It makes no difference whether the necessity had existed and corresponding *quasi*-easements been enjoyed by the lessor previously to the lease (*l*), or whether it was created for the first time by the severance itself, in cases where, without the easement, no benefit could be derived from the grant at all (*m*). The enjoyment, however, must be limited by reference to the nature of the user of the premises at the date of the lease (*n*), and the right to it will cease with the necessity (*o*).

Upon equitable doctrines, moreover, a contract will sometimes be implied on the part of a lessor to grant to his lessee a right in the nature of an easement over other lands belonging to him, where he has by his conduct knowingly encouraged the lessee to expend money on the premises on the faith of such right being granted, provided such right is one reasonably essential to the enjoyment of the demised property (*p*).

But, starting from the general principle that easements pass to the lessee and *quasi*-easements (except as above) do not, a further qualification in favour of certain classes of *quasi*-easements has, by a long series of decisions, now become established. The whole result may be expressed thus:—

A lease (without express words in that behalf)—

(1) *Passes* to the lessee easements strictly appurtenant to the premises demised.

(2) *Creates* in his favour easements of necessity over adjacent property retained by the lessor.

(3) *Converts* into easements in his favour all such *quasi*-easements as are “continuous” and “apparent,” and also (probably) (*q*) rights of way over a formed and defined road (*r*).

(*j*) *Donnelly v. Adams*, [1905] 1 I. R. 154, per Lord Ashbourne, L. C.

(*k*) *Id.*, per Holmes, L. J.

(*l*) *Wheeldon v. Burrows*, 12 Ch. Div. at p. 49, per Thesiger, L. J.

(*m*) Notes to *Pomfret v. Ricroft*, 1 Wms. Saund. at p. 570 (ed. 1871).

(*n*) *Gayford v. Moffatt*, L. R. 4 Ch. 133;

Strick v. City Offices Co., 22 T. L. R. 667.

(*o*) *Holmes v. Goring*, 2 Bing. 76. The authority of this case, however, has

been doubted. See the matter discussed in Gale on Easements, pp. 158 *et seq.*

(*p*) *Bankart v. Tennant*, L. R. 10 Eq. 141, per James, V.-C.

(*q*) Per Fry, L. J., in *Bayley v. G. W. Ry. Co.*, 26 Ch. Div. 434, and *Thomas v. Owen*, 20 Q. B. Div. 225.

(*r*) See *Ford v. Metropolitan, &c., Ry. Co.*, 17 Q. B. Div. 12. Or line of rail: *Brasier v. Glaspool*, W. N. 1901, p. 237; W. N. 1902, p. 162 (C. A.).

Easements are "continuous" which are not used from time to time only (*s*), *e.g.*, the right to light (*t*), to the use of a drain (*u*), or to an artificial watercourse (*v*); but not a right of way (*x*). Easements are "apparent" if their existence is shown not only by those signs which must necessarily be seen, but also by those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject (*y*).

Thus, where up to the date of the lease there has been a user of corresponding privileges (*quasi*-easements) by the lessor, for the convenience of the property he afterwards demises, in such a way that, but for the unity of ownership, they would have been easements enjoyed as appurtenant to such premises (*z*), the *quasi*-easements will (provided the convenience does not cease to exist upon the severance of the property) (*a*) become real easements in the hands of the lessee (*b*). And that the right is one which has been used only for a limited purpose is not an effectual objection to an implied grant (*c*).

If, for example, a person possessed of a house and adjoining land let the house, retaining the land, he may not afterwards (in the absence of an express power reserved to him to that effect) (*d*) obstruct the lights of the house as they existed at the date of the lease (*e*); the same principle, too, applying where no house exists, but its erection (in accordance with plans approved, either expressly or by implication, by the grantor) is intended by both parties at the date of the grant (*f*), whether the grant refers in terms to the intention of building or not (*g*). And these rights the lessee can enforce not only against the lessor, but against all persons claiming under him, as a tenant of adjacent premises

(*s*) Per Erle, C. J., *Polden v. Bastard*, L. R. 1 Q. B. at p. 161.

(*t*) *Allen v. Taylor*, 16 Ch. D. 355; *Phillips v. Low*, [1892] 1 Ch. 47, per Chitty, J.

(*u*) *Hall v. Lund*, 1 H. & C. 676, per Channell, B.

(*v*) *Watts v. Kelson*, L. R. 6 Ch. 166; *Bunting v. Hicks*, 70 L. T. 455.

(*z*) *Polden v. Bastard*, *ubi sup.*; per A. L. Smith, J., in *Roe v. Siddons*, 22 Q. B. Div. 224, and *Taves v. Knowles*, [1891] 2 Q. B. 564.

(*y*) Per Watson, B., in *Pyer v. Carter*, 1 H. & N. at p. 922. For instance, the right of access to a pump not approached from the demised premises by any definite path is not such an easement: *Kilgour v. Gaddes*, *supra*.

(*s*) *Bayley v. G. W. Ry. Co.*, *supra*.

(*a*) Per Blackburn, J., *Kay v. Ozley*, L. R. 10 Q. B. at p. 366.

(*b*) See two last-cited cases, and *cf. May v. Belleville*, [1905] 2 Ch. 605.

(*c*) *Brazier v. Glaspool*, W. N. 1901, p. 237, per Byrne, J. *Affd.* (C. A.) on another ground, W. N. 1902, p. 162.

(*d*) See, *e.g.*, *Haynes v. King*, [1893] 3 Ch. 439.

(*e*) See *Swanborough v. Coventry*, 9 Bing. 305, per Tindal, C. J.; *Allen v. Taylor*, 16 Ch. D. 355; *Robinson v. Grave*, 29 L. T. 7.

(*f*) *Bailey v. Icke*, 64 L. T. 789. *Cp. infra*, p. 86.

(*g*) *Robinson v. Grave*, 21 W. R. at p. 225, per Wickens, V.-C.

under a subsequent lease (*h*), even though such tenant may have previously held under a demise prior to his own (*i*). Where, therefore, the owner of land agreed to grant a lease of it when a house of a specified character should have been erected, it was held (the house having been built and the lease granted) that the doctrine that the grantor could not derogate from his own grant must be applied, not to the vacant piece of land, but to the land with the house on it according to the contract; and a subsequent purchaser from him of an adjoining plot, in the absence of evidence establishing a definite building scheme (*j*), was restrained from building so as to interfere with the access of light to the house as theretofore enjoyed (*k*).

It must be observed that the rights thus conferred upon the lessee arise, not from the interpretation of the instrument of demise, but from the relation *ipso facto* assumed by a grantor to his grantee: "the grantor having given a thing with one hand is not to take away the means of enjoying it with the other" (*l*). Hence it is that the principle applies, although the premises granted do not physically adjoin those retained by the grantor, if they are so adjacent that the enjoyment of the former evidently depends on the state of the latter (*m*). It follows also that no easement can in general be implied, unless at the time of the grant the grantor had such an interest in the adjoining premises as would have enabled him to grant it expressly (*n*).

A further result too is that the grantee may not be entitled to the same *amount* of enjoyment as heretofore had with the premises, and it has even been said that the *prima facie* measure is what must have been assumed by both parties to be reasonably necessary to their fair and comfortable use, rather than what has been in fact enjoyed (*o*). But such amount must always be regulated by reference to the condition of the premises at the

(*h*) *Hinchliffe v. Lord Kinnoul*, 5 Bing. N. C. 1; *Myers v. Catterson*, 43 Ch. Div. 470.

(*i*) *Coutts v. Gorkham*, Moo. & M. 396.

(*j*) Cp. *infra*, p. 86.

(*k*) *Pollard v. Gare*, [1901] 1 Ch. 834.

(*l*) Per Bowen, L. J., in *Birmingham, &c., Banking Co. v. Ross*, 38 Ch. Div. at p. 313. Cp. *Aldin v. Latimer Clark & Co.*, [1894] 2 Ch. 437, cited *post*, p. 146.

(*m*) *Birmingham, &c., Banking Co. v. Ross*, 38 Ch. Div. at p. 314.

(*n*) *Quicke v. Chapman*, [1903] 1 Ch. 659 (where it was held that a mere licence, coupled with an interest in the adjoining land which could not ripen into ownership until the doing of an act in itself destructive of the easement, was insufficient). Cp. *Prinsep v. Belgravian Estate*, W. N. 1896, p. 39; *Financial Times v. Bell*, 19 T. L. R. 433.

(*o*) Per Bowen, L. J., *ubi supra*. But this (as a general proposition) would scarcely appear correct: see *Broomfield v. Williams*, cited *infra*, p. 86.

time the grant was made (*p*). The maximum granted is such a reasonable amount as is required for the ordinary enjoyment of the premises in the immediate future and can be reasonably anticipated as likely to be required in the more distant future; and the Court cannot impute to the grantor and grantee an intention (so as to make that intention part of the contract between them) that an amount should be had necessary for a special purpose not shown to be present to the minds of either of them at the date of the contract (*q*). And the rights in question may either be increased (*r*) or diminished (*s*) *pro tanto* by knowledge of the parties of special circumstances existing at the time of the grant. Thus, for example, they will not operate to prevent grantors (a railway company) from doing whatever is necessary for the purpose of constructing their railway, if the grantees have notice of an intention to use the adjoining land for that purpose (*t*). So if at the time of granting a lease the lessee has notice of an intention to use the adjoining land for purposes of building, the right to light granted to him by the lease will not be such as to prevent such land from being built upon and used as building land (*u*). But this does not apply to permit the lessor, where he has conveyed land with a house by an instrument referring to adjoining land retained by him as building land, to build upon this land in such a way as to interfere with the light to the house (*x*), at all events where it is possible to build upon it without doing so (*y*). Each case depends on its own circumstances, as the real question is always one of the intention of the parties at the time the lease is made (*z*). But where it is sought to show that the *prima facie* rights of enjoyment by the grantee are curtailed, as in the above instances, the burden of proof is of course upon the grantor, as he is derogating from his own grant (*a*).

The foregoing results have been expressed in the following way:—In order to see whether, upon a grant of lands, the grant of an easement (*e.g.*, of light) over the adjacent land is to be

(*p*) *Wood v. Saunders*, L. R. 10 Ch. 582; *Watts v. Kelson*, L. R. 6 Ch. 166.

(*q*) *Corbett v. Jonas*, [1892] 3 Ch. 137.

(*r*) See *Caledonian Ry. Co. v. Sprot*, 2 Macq. at pp. 451, 452.

(*s*) *Birmingham, &c., Banking Co. v. Ross*, *supra*.

(*t*) *Myers v. Catterson*, 43 Ch. Div. 470.

(*u*) *Wilson v. Queen's Club*, [1891] 3 Ch. 522, per Romer, J.; *Robson v. Palace Chambers Co.*, 14 T. L. R. 56.

(*x*) *Supra*, at note (*e*).

(*y*) *Broomfield v. Williams*, [1897] 1 Ch. 602. Cf. *Pollard v. Gare*, [1901] 1 Ch. 834, cited *supra*, p. 85.

(*z*) *Hall v. Lund*, 1 H. & C. 676, per Wilde, B.

(*a*) *Brconfe'd v. Williams*, *supra*.

implied, it is necessary to inquire, first, into the title to that adjacent land, in order to see whether the grantor has a sufficient interest therein to enable him to grant the right expressly,—an inquiry which has nothing to do with the question whether the grantee did or did not at the time of the grant know of the state of the title;—and secondly, into the surrounding circumstances which may affect the two pieces of land, and which in order to be relevant must have been known to both the parties (*b*).

(*B*.) By the addition of the expression “with all appurtenances,” or “with all rights, &c., thereto appertaining,” or other similar words, the grant confers upon the lessee all the rights previously set forth,—and such rights may accordingly include what is not legally appurtenant (*c*), whenever it manifestly appears to have been so intended by the parties (*d*), but not otherwise (*e*). It also confers the right to use a formed road under the circumstances already stated (*f*), either if the right had been previously enjoyed by the tenant of the demised premises (*g*), or even if it had been enjoyed only by the lessor himself (he being in occupation), provided it was clearly the intention of the parties that it should be conferred (*h*).

(*C*.) Various wider formulas have also been employed by conveyancers, the essential feature being the grant of all rights, &c., with the premises *used, occupied, or enjoyed*. It will be sufficient for the present purpose to consider solely that which, by force of the Conveyancing Act (*i*), is incorporated in all conveyances (including leases (*k*)) made subsequent to the year 1881—a formula closely resembling many of those which have been the subject of decision (*l*). The words, however, are not to be imported

(*b*) *Quicke v. Chapman*, [1903] 1 Ch. 659, per Romer, L. J.

(*c*) *Morris v. Edgington*, 3 Taunt. 24.

(*d*) *Barlow v. Rhodes*, 1 Cr. & M. 439; *Worthington v. Gimson*, 2 E. & E. 618.

(*e*) See *Baring v. Abingdon*, [1892] 2 Ch. 374.

(*f*) Per Fry, L. J., in *Bayley v. G. W. Ry. Co.*, 26 Ch. Div. at p. 457.

(*g*) *Thomas v. Owen*, 20 Q. B. Div. 225. Cp. *Nicholls v. Nicholls*, 81 L. T. 811. (*Brett v. Clowser*, 5 C. P. D. 376, seems on this point to be overruled.)

(*h*) *Brown v. Alabaster*, 37 Ch. D. 490. Both in this case and in *Thomas v.*

Owen, *supra*, it was intimated that the result would probably have been the same without the use of the word “appurtenances.”

(*i*) 44 & 45 Vict. c. 41.

(*k*) Sect. 2, sub-s. 5.

(*l*) *Eg.*, in *James v. Plant*, 4 A. & E. 749; *Thomson v. Waterlow*, L. R. 6 Eq. 36; *Langley v. Hammond*, L. R. 3 Ex. 161; *Watts v. Kelson*, L. R. 6 Ch. 166; *Kay v. Oxley*, L. R. 10 Q. B. 360; *Barshire v. Grubb*, 18 Ch. D. 616; *Bayley v. G. W. Ry. Co.*, 26 Ch. Div. 434; *Key v. Neath Rural Council*, 93 L. T. 507 (affd., C. A., 95 L. T. 771).

if a contrary intention appear from the instrument (*m*); but how far the use in such a conveyance of more restricted general words of itself evinces such a contrary intention has been discussed but not hitherto decided (*n*). The mere description, however, in the conveyance of land with a house upon it, of adjoining land retained by the grantor as "building land," is not sufficient evidence of such contrary intention, so as to displace the rights to light referred to in the statute, at least where it is possible to build on the adjoining land without darkening the windows of the house (*o*). And the same thing applies where, though there is no definite building scheme, the negotiations and agreement which have preceded the conveyance have been entered into by reference to a plan on which the whole property of which the land conveyed forms part is marked out in building plots, with a building line marked on the plan so as to extend through all the plots (*p*).

The object of the statute is not to alter contracts or the rights that flow from contracts, but to show what general words are to be taken as included in a conveyance where the conveyance is otherwise silent; and neither party to a contract is entitled to have these general words included in the conveyance unless they are justified by the contract and appropriate to the proved circumstances of the case (*q*). It follows too that, in conformity with a principle already referred to (*r*), the easements comprised by virtue of the Act within a particular conveyance are only such as the grantor could grant by express words, and not those which he has no power to grant expressly (*s*).

By s. 6, "a conveyance of land shall be deemed to include and shall . . . operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with (*t*), or reputed or known as part or parcel of, or appurtenant to, the land or any part thereof" (*u*). And "a conveyance of land having houses or other buildings thereon

(*m*) Sect. 6, sub-s. 4.

(*n*) *Beddington v. Atlee*, 35 Ch. D. at p. 331; *Birmingham, &c., Banking Co. v. Ross*, 38 Ch. Div. at p. 308, per Cotton, L. J.

(*o*) *Broomfield v. Williams*, [1897] 1 Ch. 602.

(*p*) *Pollard v. Gare*, [1901] 1 Ch. 834.

(*q*) *In re Peck*, [1893] 2 Ch. 315.

(*r*) *Supra*, p. 85.

(*s*) *Quicke v. Chapman*, [1903] 1 Ch. 659.

(*t*) See *Braxier v. Glasspool*, W. N. 1901, p. 237; W. N. 1902, p. 162 (C. A.)

(*u*) Sub-s. 1.

shall be deemed to include and shall . . . operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of, or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof" (*v*).

It should be noticed that "general words" do not pass easements only, but must be construed, like any other words, with reference to what they are intended to mean (*x*); hence, for instance, the use of the term "yards" among the general words will pass the actual soil of the yards, and not merely the right of way over them (*y*). On the other hand, the object of their introduction in a grant being merely to cover anything which may not have been specifically mentioned, their presence in no way amounts to a warranty on the part of the grantor that there is anything to answer to them (*z*). They refer to rights usually enjoyed by an occupier, and consequently are not apt words to include, for instance, a right to an allotment belonging to the owner (*a*). Thus, in a lease of lands to which rights of common were formerly attached, they will not, after those rights have been extinguished by an inclosure of the waste lands, serve to pass the right to the possession of the allotment awarded by statute in lieu of the rights in question (*b*).

The effect of these provisions is that the test in cases of severance is no longer to be sought in the distinction between continuous and discontinuous, or apparent and unapparent, easements, but in the consideration whether the easement claimed by the lessee, though neither one of necessity nor strictly appurtenant, was *at the date of the lease in fact enjoyed as appurtenant* to the demised premises by the lessor or by a previous lessee over adjacent tenements of the lessor. Even where the general words contained the expression "now or heretofore held or enjoyed," and the

(r) Sub-s. 2.

(z) Per Fry, J., in next-cited case.

(y) *Willis v. Watacy*, 51 L. J. Ch. 181.(z) *Baring v. Abington*, [1892] 2 Ch. 374, per Lindley, L. J.

(a) Per Bramwell, L. J., in next-cited case.

(b) *Williams v. Phillips*, 8 Q. B. Div. 437.

easement claimed was a right of way over a formed road which had been used by a predecessor in title, but which had been blocked up by a wall built by him many years before the date of the grant and subsequently (with one exception) never used, it was held that the presumption that the word "heretofore" was used in its ordinary meaning was rebutted by the fact, that in order to maintain the alleged right it would be necessary to alter the physical condition of the premises from what it was at the date of the grant (c). If the enjoyment has been had by the lessor for his convenience as owner of the whole property (as distinguished from user of the portion retained for the benefit of that demised), and such convenience ceases to exist upon the severance (d): or if it has been had by a previous lessee in virtue of a licence personal to himself, or under such circumstances that it was a precarious enjoyment of a kind to negative an expectation that it would be continued (e):—in each of these cases the words of the statute will not suffice to create a corresponding easement in favour of the lessee. On the other hand, it has been held that the mere fact that the enjoyment has been wholly permissive and precarious will not prevent the statute from passing the right to an enjoyment of the same amount where it has been actually had, on the ground that the real question to be considered is not that of title to use, but that of fact of user (f).

Inasmuch as it is also the effect of these provisions to grant expressly the rights otherwise, as has been already seen, implied from the relation of grantor and grantee (g), such grant will, it is conceived, be free from those limitations as to the amount of enjoyment granted, which arise from that relation (h).

The period for which an easement over other tenements of the lessor is conferred upon a lessee is limited to the duration of the estate in such tenements vested in the lessor at the time of the execution of the lease (i), assuming that he has not purported to grant it for a longer term (k). Where such tenements are at the date of the lease out of the lessor's possession, but revert to

(c) *Roe v. Siddons*, 22 Q. B. Div. 224.

(d) *Supra*, p. 84; *Kay v. Oxley*, L. R. 10 Q. B. at p. 366, per Blackburn, J.

(e) *Birmingham, &c., Banking Co. v. Ross*, 38 Ch. Div. at p. 307, per Cotton, L. J.; *Burrows v. Lang*, [1901] 2 Ch. 502; *Brasier v. Glasspool*, W. N. 1901, p. 237; W. N. 1902, p. 162 (C. A.); *Godwin v. Schweppes*, [1902] 1 Ch. 926.

(f) *International Tea Stores Co. v. Hobbs*, [1903] 2 Ch. 165. The conveyance here was made to the persons who had had the precarious enjoyment as lessees themselves.

(g) See *Broomfield v. Williams*, [1897] 1 Ch. 602.

(h) *Supra*, p. 85.

(i) *Booth v. Alcock*, L. R. 8 Ch. 663.

(k) *Id.*, per James, L. J.

him at some period before its expiration, the lessee's rights over them, either against the lessor or against any person claiming under him, attach from that time (*l*). But in every case those rights only co-exist with the demise, so that if the latter should be determined before the expiration of the full term for which it is granted, they will *ipso facto* cease also (*m*).

II. *Easements, &c., which remain to the lessor. (Implied reservations.)*

It remains to say a few words on the subject of implied reservations. It is a general principle that a grantor may not derogate from his own grant (*n*), and that such grant is always construed strictly against him (*o*). It follows that a lessor retains, as a rule, no rights over premises demised by him, although actually exercised at the time of severance and not merely in contemplation (*p*), except such as are reserved to him by the lease in clear (*q*) and express terms (*r*). Hence, for example, if a person possessed of a house and adjoining land let the land, retaining the house, the lessee, in the absence of express stipulation to the contrary, may afterwards obstruct the lights of the house (*s*); and this however long the period for which they may have been enjoyed (*t*).

To this rule, however, there is a well-established exception in the case of easements of necessity (*u*), which the lessor does retain; but such rights, though commonly known as reservations, are, in strictness, fictitious re-grants by the lessee to him (*x*). The enjoyment in such case is accordingly to be limited to that which became necessary at the date of the lease (*y*). It has been said that an easement of necessity, in this connection, means an easement without which the property retained cannot be used at all, and not one merely necessary to its reasonable enjoyment (*z*). The

(*l*) *Warner v. McBryde*, 36 L. T. 360.
(*m*) *Beddington v. Atlee*, 35 Ch. D. at p. 323.

(*n*) *Palmer v. Fletcher*, 1 Lev. 122, per Twisden and Wyndham, JJ.

(*o*) *Shep. Touch*. 87. Cf. *White v. Harrow*, 86 L. T. 4, cited *post*, p. 131.

(*p*) See *Watson v. Troughton*, 48 L. T. 508.

(*q*) *Mundy v. Duke of Rutland*, 23 Ch. Div. 81.

(*r*) *Wheeldon v. Burrows*, 12 Ch. Div. 31; *Whitehead v. Parks*, 2 H. & N. 870. The rule is the same in the case of a conveyance by way of mortgage as in an absolute conveyance: *Taues v. Knowles*, [1891] 2 Q. B. 564.

(*s*) *Allen v. Taylor*, 16 Ch. D. 355, per Jessel, M. R. (*Riviere v. Bower*, Ry. & M. 24, *semd. cont.*)

(*t*) *White v. Bass*, 7 H. & N. 722; *Curriers' Co. v. Corbett*, 2 Dr. & Sm. 355; *Ellis v. Manchester Carriage Co.*, 2 C. P. D. 13.

(*u*) *Wheeldon v. Burrows*, *supra*; *Pinnington v. Gulland*, 9 Exch. 1; *Davies v. Sear*, L. R. 7 Eq. 427.

(*x*) See *infra*, p. 95.

(*y*) *Corporation of London v. Riggs*, 13 Ch. D. 798.

(*z*) *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557, per Stirling, L. J.

circumstance, for instance, that a portion of such property can no longer be used for a particular purpose (where it can be used for others) is insufficient to bring the case within the exception (a). There is also an implied reservation in the case of rights of support where such support is mutual between adjoining buildings; but whether this falls under the head of easements of necessity (b), or whether it forms a class altogether apart (c), appears not to be clearly settled.

Perhaps, also, the exception may extend to other "mutual and reciprocal" easements, *e.g.*, the right to use a common drain (d). And there seems to be a further exception to be added in the case where that which is claimed to be reserved is not an incorporeal easement, but part and parcel of an adjoining building or property belonging to the party who conveys, when it is not included in the conveyance, and may be regarded as appurtenant to such property (e). But a future easement of support, "if wanted," cannot be implied either on the ground of necessity or otherwise (f). Hence, where the wall of one of two adjoining houses held under separate underleases carved out of the same head lease and ending together a few days before it, gave support to the other—but only by agreement between the occupiers co-terminous with their own interests,—it was held that upon the sub-tenant of the former obtaining from the freeholders, some years before the expiration of his interest, a new lease comprising the wall, there was no implied reservation of such right of support; and that consequently, upon the sub-tenant of the latter afterwards renewing his interest on exactly the same terms, he had lost that right, which, so long as the agreement remained in force, he had enjoyed (g). For the new lease was, as regards the implied reservation of easements, only to come into operation at the end of the former head lease, and it was quite uncertain what the state of things would then be, the covenants themselves showing that it was within the contemplation of the parties that the premises might be pulled down, provided that other buildings of specified value were substituted (g).

(a) *Ray v. Haseldine*, [1904] 2 Ch. 17.

(b) See *Richards v. Rose*, 9 Exch. 218.

(c) See per Cotton, L. J., in *Russell v. Walls*, 25 Ch. Div. at p. 573. (The actual decision was reversed in the H. L.; see *infra*.)

(d) *Wheelton v. Burrows*, 12 Ch. Div. at p. 53, per Theigier, L. J.

(e) *Union Lighterage Co. v. London Graving Dock Co.*, *supra*.

(f) Per Lindley, L. J., in next-cited case.

(g) *Howarth v. Armstrong*, 77 L. T. 62. The new lease was one to take effect, as to possession, from one day after the expiration of the former head lease.

In certain cases, too, evidence may be admissible to rebut the application of the general rule. Thus, just as the lessee's right (as against the lessor) to a certain portion of premises, which might otherwise pass by the demise, may be defeated by proof of his knowledge at the time of the lease that such portion had already been demised to another person (*h*), so the fact of a notorious and long-continued user by a third person (tenant of adjoining premises) of a road traversing the demised premises, but subsisting visibly for the convenience of the former, is admissible to show that a reservation of such right of way was intended by the lessor (*i*). (In such a case it is submitted that it depends on the sufficiency of the rebutting evidence whether the lessee takes subject merely to a right previously vested in the tenant of the adjoining premises, or whether the easement is altogether reserved out of the parcels in favour of the lessor and all claiming under him.) Where, however, such right of way did not amount to an easement, but the user was the exercise of the mere right of an occupier of two different portions of one occupation, it was held, upon the severance of the two portions and the grant to a third person of the servient tenement, that there was no implied reservation of the right of way (*k*).

Further, upon equitable doctrines of contract, the lessor always retains such rights over the premises demised, as it would be contrary to the good faith of the particular contract upon which the lease is founded to refuse him; or, as it has been otherwise expressed, the above-mentioned general rule cannot be "invoked in defence of any act contrary to the good faith of a particular contract" (*l*). Thus, where it is mutually agreed at the time of a lease that the lessor shall build a house upon adjoining land which he retains, with particular windows in it overlooking the land demised, the lessee will not be allowed subsequently to obstruct them (*m*). Similarly, where an agreement for the grant of lands with an express reservation in favour of the grantor is followed by a conveyance to the same effect, the fact that the latter has remained unexecuted by the grantee will not, if possession has been given on the above footing, prevent the reservation from being effectual (*n*).

Where the owner of two adjoining tenements leases first one

(*h*) *Doe v. Burt*, 1 T. R. 701.

(*i*) *Thomas v. Owen*, 20 Q. B. Div. 225.

(*k*) *Gordon v. Ogilvie*, 15 T. L. R. 239.

(*l*) Per Lord Selborne, *Russell v. Watte*, 10 App. Ca. at p. 596.

(*m*) *Id.*, at pp. 602-3.

(*n*) *May v. Belleville*, [1905] 2 Ch. 605.

and then the other to different lessees, the later lessee takes subject to all the rights acquired by the earlier lessee against their common lessor (*o*). And it makes no difference that the earlier lease has not actually been granted if the lessor have entered into a binding contract to grant it (*p*). Whether he is entitled to the benefit of any reservations from the earlier lease, expressed or implied, will depend upon the construction of his own lease (*q*). But restrictive covenants contained in the earlier lease do not as a rule enure to him, nor can he require his lessor to enforce them (*r*).

Where, however, two leases are "contemporaneous," each lessee takes subject to the easements here spoken of (*s*) used by the common owner at the time over the one tenement for the benefit of the other (*t*). Leases are contemporaneous when they are either simultaneous, or part and parcel of one transaction in such a way as to be regarded in equity as equivalent to leases actually executed at the time the transaction was entered into (*u*): provided, however, that they be not separated by an unreasonable interval (*x*).

Exceptional cases sometimes arise under building schemes when contemporaneous leases of adjoining plots are made providing for the erection of buildings according to a definite plan embracing them all. In such cases, although there has been no previous user, and without any express reservation, each lessee is bound not to obstruct the lights essential to a building erected by another lessee under the scheme; and upon the determination of any of the leases the benefit of such obligation will enure to the lessor and will pass by implication to any subsequent lessee (*y*). The principle, being founded upon equitable doctrines of contract, would seem to apply to other easements obviously essential to such a scheme as well as to light.

Express reservations and exceptions.—In addition to the implied reservations which have just been dealt with, it is not unusual in leases to meet with express reservations and exceptions in favour of the lessor.

(*o*) *Supra*, p. 84.
(*p*) *Beddington v. Atlee*, 35 Ch. D. 317.

(*q*) *Thomas v. Owen*, *supra*.
(*r*) *Master v. Hansard*, 4 Ch. Div. 718. See this matter discussed *post*, pp. 260—263.

(*s*) *Barnes v. Loach*, 4 Q. B. D. 494; *Phillips v. Low*, [1892] 1 Ch. 47. These were cases of devisees, but the principle is the same.

(*t*) *Allen v. Taylor*, 16 Ch. D. 355; *Compton v. Richards*, 1 Price, 27; *Swansborough v. Coventry*, 9 Bing. 305.

(*u*) *Wheeldon v. Burrows*, per Thesiger, L. J., 12 Ch. Div. at p. 60.

(*x*) *Rigby v. Bennett*, 21 Ch. Div. 559, per Jessel, M. R. In this case the interval was one of thirteen months, and was held unreasonable.

(*y*) *Russell v. Watts*, 10 App. Ca. 590.

The term "reservation," in its strict sense, refers to something not part of the parcels and not *in esse*, but newly created and issuing out of them, such as a rent or services(*z*); but it is frequently used in a looser sense of almost any right in relation to the subject-matter of the demise which the lessor desires to retain in his own hands, as for example of the right to resume possession (an allowance being made in the rent) of a portion of lands demised, if it were desired to sell it for building sites(*a*). Its principal application is to easements(*b*), like rights of way, and to *profits à prendre*, like rights of sporting; and the real legal effect of a reservation of this kind is, as already mentioned(*c*), that of a re-grant of the right in question by the lessee (to whom it passes by the demise(*d*)) to the lessor(*e*), though in some cases its operation may be by way of covenant merely(*f*). It should, however, be mentioned that the operation of a reservation as a re-grant only holds where the right reserved is not by law already appurtenant to lands retained by the lessor(*g*). A reservation of power to make a covered sewer or watercourse through the demised lands, in order to carry off drainage from adjoining premises of the lessor, gives to the latter, when such watercourse is made, the exclusive right as against the tenant to its use(*h*). A reservation of "the free running of water and soil coming from any other buildings and lands contiguous to the premises hereby demised, in and through the sewers and watercourses made or to be made within, through, or under the said premises," extends to water and soil coming from contiguous lands and buildings, whether they actually in the first instance arose from them or not; but not to water not in its natural condition, and such matters as are the product of the ordinary use of land for habitation(*i*). The exception of a watercourse in a lease may refer either to the channel in which water flows, or to the stream or flow of the water itself, the question being one of construction, which depends materially on the context in which the expression occurs(*k*). Rights of this kind, being incorporeal hereditaments,

(*z*) Co. Lit. 47 a; *Doe v. Lock*, 2 A. & E. 705. See *post*, pp. 113—116.

(*a*) *English v. Tynemouth Corporation*, 1 L. G. R. 177, where it was held that such a provision referred to buildings in the nature of dwelling-houses and shops, and did not apply to land intended to be used for building a hospital.

(*b*) See *supra*, pp. 81 *et seq.*

(*c*) *Supra*, p. 91.

(*d*) *E.g.*, rights of fishing: *Jones v.*

Davies, 86 L. T. 447 (reported as *Davies v. Jones*, 18 T. L. R. 867).

(*e*) *Wickham v. Hawker*, 7 M. & W. 63; *Houstoun v. Sligo (Lord)*, 55 L. T. 614.

(*f*) See *Dynvor (Lord) v. Tennant*, 13 App. Ca. 279.

(*g*) See *Pannell v. Mill*, 3 C. B. 625.

(*h*) *Lee v. Stevenson*, E. B. & E. 512.

(*i*) *Chadwick v. Marsden*, L. R. 2 Ex. 285.

(*k*) *Doe v. Williams*, 11 Q. B. 688.

can (speaking generally) only be granted by deed (*l*), executed by the lessee (*m*).

Reservation of game.—This, however (which is one of the commonest of all such reservations), may in a parol demise be made, at all events for the purposes of the Game Act (*n*), by parol (*o*). By this Act nothing is to authorize any person holding any land to kill or take the game, or to permit any other person to do so, upon such land, in any case where by any lease or any written or parol demise or contract a right of entry upon such land for the purpose of killing or taking the game has been reserved by or given to any landlord or other person whatsoever (*p*); and certain penalties are provided which may be enforced upon the infringement of this provision (*q*). The demise or contract, however, must actually reserve the right of entry in order to take the game; a mere agreement, for instance, by a tenant not to destroy any game, but to endeavour to preserve it, is not sufficient, for by such agreement the right to kill the game, though taken away from the tenant, is not given to the landlord (*r*). A reservation of "hunting," too, will not extend to shooting feathered game (*s*); but a reservation of the right of "shooting and sporting" over demised land is not limited to game strictly so called, but entitles the lessor to the exclusive right to follow and shoot such animals as are in common parlance understood to be the subject of sport (*t*). Where lands were let together with the right "in common with the lessor . . . and any friend" of shooting over them and also over certain other lands not included in the demise, it was held that the lessor's right of introducing friends extended to more than one at a time (*u*). A reservation of game will not entitle the landlord (or a person to whom he has let the shooting) to bring it on to the land to an unreasonable amount, or cause it to increase to an unreasonable extent so as to injure the tenant's crops (*v*).

Moreover, where (after the end of the year 1908 (*x*)) a tenant

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| (<i>l</i>) See <i>ante</i> , p. 18. | (<i>s</i>) <i>Moore v. Plymouth (Lord)</i> , 7 Taunt. 614. |
| (<i>m</i>) <i>Durham and Sunderland Ry. Co. v. Walker</i> , 2 Q. B. at p. 967, per Tindal, C. J. | (<i>t</i>) <i>Jeffryes v. Evans</i> , 19 C. B. N. S. 246, per Erle, C. J. |
| (<i>n</i>) 1 & 2 Will. 4, c. 32. | (<i>u</i>) <i>Gardiner v. Colyer</i> , 10 L. T. 715. |
| (<i>o</i>) <i>Jones v. Williams</i> , 46 L. J. M. C. 270. | (<i>v</i>) <i>Farrer v. Nelson</i> , 15 Q. B. D. 258. |
| (<i>p</i>) Sect. 8. | Cp. <i>Hilton v. Green</i> , 2 F. & F. 821; |
| (<i>q</i>) Sect. 12. | <i>Birkbeck v. Paget</i> , 31 Beav. 403. |
| (<i>r</i>) <i>Coleman v. Bathurst</i> , L. R. 6 Q. B. 366. | (<i>x</i>) 6 Edw. 7, c. 56, s. 9. |

"has sustained damage to his crops from game (*y*) the right to kill and take which is vested neither in him nor in any one claiming under him other than the landlord, and which the tenant has not permission in writing to kill, he shall be entitled to compensation from his landlord (*z*) for such damage, if it exceeds in amount the sum of one shilling per acre of the area over which the damage extends, and any agreement to the contrary, or in limitation of such compensation, shall be void (*a*). The amount of compensation payable . . . shall in default of agreement made after the damage has been suffered be determined by arbitration (*b*); but no compensation shall be recoverable . . . unless notice in writing is given to the landlord as soon as may be after the damage was first observed by the tenant, and a reasonable opportunity is given to the landlord to inspect the damage (*a*) in the case of damage to a growing crop before the crop is begun to be reaped, raised, or consumed, (*b*) in the case of damage to a crop reaped or raised before it is begun to be removed from the land; and unless notice in writing of the claim, together with the particulars thereof, is given to the landlord within one month after the expiration of the calendar year, or such other period of twelve months as by agreement between the landlord and tenant may be substituted therefor, in respect of which the claim is made (*c*). Where the landlord proves that, under a contract of tenancy made" before 1st January, 1909 (*d*), "any compensation for damage by game is payable by him, or that in fixing the rent to be paid under such contract allowance in respect of such damage to an agreed amount was expressly made, the arbitrator shall make such deduction from the compensation which would otherwise be payable . . . as may appear just" (*e*).

Further, as regards *ground game* (*i.e.*, hares and rabbits) (*f*), the power of the lessor to make any reservation at all has now been greatly curtailed. For by the Ground Game Act, 1880 (*g*), it is

(*y*) *I.e.*, deer, pheasants, partridges, grouse, and black game: 6 Edw. 7, c. 56, s. 2.

(*z*) Where the right to kill and take the game is vested in some person other than the landlord, the latter is entitled to be indemnified by him against all claims for compensation under these provisions: sect. 2 (4).

(*a*) Sect. 2 (1).

(*b*) By sect. 1 (2) the procedure must

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be that of arbitration before a single arbitrator in conformity with the provisions of Part I. of the 2nd Sched. of the Agr. Hold. Act, 1900. See *post*, pp. 734 *et seq.*

(*c*) 6 Edw. 7, c. 56, s. 2 (2).

(*d*) *Id.*, sect. 9.

(*e*) *Id.*, sect. 2 (3).

(*f*) Sect. 8 of next-cited Act.

(*g*) 43 & 44 Vict. c. 47.

H

provided that every occupier (*h*) of land shall have, "as incident to and inseparable from his occupation," the right to kill and take ground game thereon concurrently with any other person who may be so entitled (*i*). But the occupier may kill and take it only by himself or by persons duly authorized by him in writing, the occupier himself and one other person authorized by him in writing being the only persons entitled under the Act to kill ground game with firearms (*k*). No person may be authorized by the occupier to kill or take it except members of his household resident on the land, persons in his ordinary service on such land, and any one other person *bonâ fide* employed by him for reward in the taking and destruction of ground game (*l*); and every person so authorized by the occupier, on demand by any person having a concurrent right to take and kill the ground game on the land, or any person authorized by him in writing to make such demand, must produce to him the document by which he is authorized, or he will not be deemed an authorized person (*m*). A person is not to be deemed an occupier of land for the purposes of the Act "by reason of his having a right of common over such land, or by reason of an occupation for the purpose of grazing or pasturage of sheep, cattle, or horses, for not more than nine months" (*n*). Where the occupier is entitled to kill and take ground game otherwise than under the Act, he shall, if he give to any other person a title to kill and take it, retain nevertheless, as incident to and inseparable from his occupation, the same right to kill and take it as is declared by sect. 1 (*o*) of the Act; and save as aforesaid (but subject to sect. 6 (*p*)), the occupier may exercise any other or more extensive right which he may possess in respect of ground game or other game in the same manner and to the same extent as if the Act had not passed (*q*).

Then follows a provision to the effect that "every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier as declared, given, or reserved by this Act, or which gives to such occupier any advantage in consideration of his forbearing to exercise such right, or imposes upon him

(*h*) It has been held that an owner in occupation is within the protection of the Act equally with an ordinary tenant: *Anderson v. Vicary*, [1900] 2 Q. B. 287.

(*i*) Sect. 1.

(*k*) *Id.*, sub-s. 1 (*a*).

(*l*) *Id.*, sub-s. 1 (*b*).

(*m*) *Id.*, sub-s. 1 (*c*).

(*n*) Sect. 1, sub-s. 2. As to moor lands and uninclosed lands, see sub-s. 3, as extended by 6 Edw. 7, c. 21, s. 2.

(*o*) *Supra*.

(*p*) Which forbids the killing of ground game with firearms at night, and the use of traps or poison.

(*q*) Sect. 2.

any disadvantage in consequence of his exercising such right, shall be void" (r). The object of this provision, however, as it has been held, is only to prevent the occupier from surrendering to his landlord, or to another person with the landlord's collusion, the right to kill ground game which is made inalienable by the Act; and it will not prevent him, if entitled to kill it independently of the Act, from contracting with a third person to allow him to exercise the right (s). It has been said (t) to apply to agreements made before, as well as to those made since, the passing of the Act (u); but a reservation is only avoided by it so far as it may be contrary to the enactment (v), so that a reservation purporting to apply to the "exclusive right" of sporting is valid so far as winged game is concerned (x). In compliance with this provision an agreement that, in consideration of a person becoming tenant of a farm, the landlord would, if the tenant left the ground game unshot for his benefit, compensate him for damage done by such game to his crops, has been held void, although executed by the tenant, as purporting both to alienate the right given to him by the Act, and to give him an advantage in consideration of his forbearing to exercise such right (y).

Where at the date of the passing of the Act (z) the right to kill and take ground game on any land is vested "by lease, contract of tenancy, or other contract *bonâ fide* made for valuable consideration, in some person other than the occupier," the occupier is not to be entitled under the Act until the determination of that contract to kill and take ground game on such land (a); and for the purposes of the Act a tenancy from year to year, or a tenancy at will, is deemed to determine at the time when such tenancy would by law become determinable, if notice to determine it were given at the date of the passing of the Act (b). This provision does not refer necessarily to an actual

(r) Sect. 3. For a saving in the case of moor lands and uninclosed lands, see 6 Edw. 7, c. 21, s. 3.

(s) *Morgan v. Jackson*, [1895] 1 Q. B. 885.

(t) But this seems incorrect: see next paragraph, and *Allhusen v. Brooking*, *infra*.

(u) Per Channell, J., in next-cited case.

(v) Cf. sect. 55 of the Agr. Hold. Act (46 & 47 Vict. c. 61), where, however, a similar result is secured by express words.

(x) *Stanton v. Brown*, [1900] 1 Q. B. 671.

(y) *Sherrard v. Gascoigne*, [1900] 2 Q.

B. 279. The point does not seem to have been taken that the word "void" should be construed as "voidable": see *post*, p. 730. The words of this statute, however, appear a good deal stronger than those of the corresponding clause of the Agr. Hold. Act, and it seems clear that if the contract in the above case had been held good, the Act could always be evaded.

(s) 7th September, 1880.

(a) Sect. 5.

(b) *Id.* This latter clause is repealed, with the usual saving, by the Stat. Law Rev. Act, 1894 (57 & 58 Vict. c. 56).

legal vesting of the right under a lease in possession, but—in conformity with the principles already explained (c)—includes an equitable vesting under an agreement for a lease which may be enforced by specific performance (d).

Exceptions.—Unlike a reservation, an *exception* is of a defined part of the parcels themselves, being that by which a grantor excludes some part of what he has already given, in order that it may not pass by the grant, but may be taken out of it and remain with himself (e). It is sometimes worded so as to confer the right to its enjoyment on his assigns or licensees (f). To be valid, an exception (it has been said) must operate immediately, so that the subject of it does not pass to the grantee (g); and it must not be of a thing essential to the thing granted (h), or be repugnant to the demise, so as to render nugatory any part of the descriptive terms of the grant (i). An exception, however (as it has been laid down), need not necessarily be specific: thus, where a tenant entered upon a farm under an agreement for a lease of the farm “except thirty-seven acres” (without specifying which), it was held that the exception was valid, and that the choice of the excepted portion would lie with the lessee or with the lessor, according as the lease had or had not been executed (j). But an exception (in an agreement to convey) of “necessary land for making a railway” is too vague for the agreement to be enforced (k). And although the doctrine of election may apply to make good an exception which is *prima facie* bad for uncertainty, the result is to pass the whole at once, subject to the exception taking effect when the election is made (l).

Where an estate was demised with the sole licence of shooting over adjoining lands (which comprised farms) belonging to the lessor, but subject to liberty for each tenant on his farm to destroy rabbits in a particular manner, it was held that the exception applied not merely to lands which were farms at the time of the demise, but to such as from time to time should be let to tenants who might occupy them as farms (m).

(c) *Ante*, pp. 12—15.

(d) *Allhusen v. Brooking*, 26 Ch. D. 559.

(e) *Cooper v. Stuart*, 14 App. Ca. 286.

(f) See *Mitcalf v. Westaway*, 17 C. B. N. S. 658.

(g) *Cooper v. Stuart*, *supra*. But see note (l), *infra*.

(h) 3 Byth. & Jar. Conv. 132 (4th ed.).

(i) *Id.*; Shep. Touch. 79; 2 Platt on Leases, 37.

(j) *Jenkins v. Green*, 27 Beav. 437.

(k) *Pearce v. Watts*, L. R. 20 Eq. 492.

(l) *Savill v. Bethell*, [1902] 2 Ch. 523. According to the doctrine laid down in *Cooper v. Stuart*, *supra*, the exclusion of the reserved part would seem to be, not an exception, but a defeasance.

(m) *Newton v. Wilmot*, 8 M. & W. 711.

Where a certain passage was excepted from the demise of a shop and premises, but a right of way over it was granted to the lessees, it was held that the lessor, who had stood by knowing that they were expending money on improvements to the passage, and who had encouraged such expenditure with the knowledge that it was incurred by them in the mistaken belief that they could not be disturbed in their enjoyment, could not (by reason of a well-established equitable doctrine) (n) require them subsequently to restore the passage to its original condition (o).

There may be an exception out of an exception,—relating consequently to a thing which will pass by the demise to the lessee (p); but for this it must be capable of being ascertained at the time of the demise, and must not depend upon a mere future contingency (q).

In construing an exception it is a general rule that what will pass by words in a grant will be excepted by the same words in an exception (r). And, in case of doubt, the words of an exception are, as in the demise itself, to be construed against the lessor, and favourably to the lessee (s). It follows that a grant subject to an exception which is bad for uncertainty (t) is operative, though the exception fails (u). The two commonest exceptions in demises are those of (a) trees, and (b) minerals.

(a) Trees.—The word “trees,” generally speaking, means, in this connection, wood applicable to building, and does not include orchard trees (v). Thus, an exception of “all timber trees (x) and other trees, but not the annual fruit thereof,” does not include fruit trees; for “fruit,” in legal parlance, may apply to the produce of timber trees (s). Even an exception of “all trees, &c., of what kind or growth whatsoever” will not include fruit trees, where the surrounding circumstances show that they were meant to apply only to trees useful for their wood (y). With regard to the soil upon which they grow, it has been held that by an exception of “trees” the soil will not be included, save as much as may be sufficient for the vegetation and growing of the trees themselves (z); and similarly if the exception relate only to timber

(n) Cf. *supra*, p. 83; and *post*, pp. 264, 364, 365.

(o) *Civil Service, &c., Association v. Whiteman*, 68 L. J. Ch. 484.

(p) *Leigh v. Shaw*, Cro. Eliz. 372.

(q) *Jenney v. Brook*, 6 Q. B. 323.

(r) *Shep. Touch*. 100.

(s) *Bullen v. Denning*, 5 B. & C. 842.

(t) Cf. *supra*, p. 100.

(u) *Savill v. Belhell*, [1902] 2 Ch. 523.

(v) See *Bullen v. Denning, supra*.

(x) See *post*, p. 287.

(y) *Wyndham v. Way*, 4 Taunt. 316.

(z) *Liford's case*, 11 Co. 46 b.

trees (*a*). But if the exception be of "woods and under-woods" (*b*), or of "plantations" (*c*), this will be otherwise, unless the intention of the parties appear to require a different construction (*d*). Where trees are excepted from a demise, there is by implication a right in the landlord to enter the land and cut them at all reasonable times (*e*); and such an exception in a parol demise operates as a licence to enter upon the land for that purpose (*f*). The reason of this is, that when anything is excepted, all things that are depending on it and necessary for the obtaining of it are excepted also (*g*). Where, however, upon a demise excepting trees, the tenant expended money with the knowledge and consent of the landlord in laying out and improving the grounds, an injunction was granted to restrain the latter from cutting down the trees (*h*).

(*b*) Minerals (*i*).—The exception of "minerals" includes *prima facie* every substance which can be got from underneath the surface of the earth for the purpose of profit (*k*), the test being, not whether they could be worked at a market profit at the time, but whether they had a use and a value of their own independent of and separable from the rest of the soil (*l*); nor does the word "mines" placed before the word "minerals" in any way restrict its meaning (*m*). But this construction will not prevail where there is something in the context or in the nature of the transaction to confine the word to a more limited meaning (*n*). Such an exception, for instance, in a building lease will not prevent the lessee from digging the necessary foundations and converting the materials (such as brick-earth) dug out; though this holds only with reference to some definite building about to be erected by him (*o*). The effect, moreover, of construing the word in the

(*a*) *Whistler v. Paslow*, Cro. Jac. 487.

(*b*) *Id.*; *Ive v. Sams*, Cro. Eliz. 521.

(*c*) *Simpson v. Brook*, 19 J. P. 436.

(*d*) *Pincomb v. Thomas*, Cro. Jac. 524; *Legh v. Heald*, 1 B. & Ad. 622.

(*e*) Per Parke, B., in next-cited case.

(*f*) *Hewitt v. Isham*, 7 Exch. 77.

(*g*) *Shep. Touch.* 100.

(*h*) *Jackson v. Cator*, 5 Ves. 688. Cf. *supra*, p. 101, at note (*o*).

(*i*) On the law relating to minerals generally, which of course lies quite outside the scope of the present work, reference must be made to special treatises on the subject.

(*k*) *Hext v. Gill*, L. R. 7 Ch. 699, per Mellish, L. J.

(*l*) *Jersey (Lord) v. Guardians of Neath*, 22 Q. B. Div. 555, per Bowen, L. J. (commenting on *Lord Provost, &c., of Glasgow v. Farie*, 13 App. Ca. 657); *Johnstone v. Crompton*, [1899] 2 Ch. 190. See, however, the judgment of Bowen, L. J., *ubi sup.*, itself commented on by Lord Halsbury, L. C., in *In re Todd, Birlestone & Co.*, [1903] 1 K. B. at p. 607.

(*m*) *Hext v. Gill*, *ubi sup.*

(*n*) *Id.* For an instance where the word was held not to be so confined, see *Greville v. Hemingway*, 87 L. T. 443.

(*o*) *Robinson v. Milne*, 53 L. J. Ch. 1070.

ordinary way, so as to except certain things from a demise, will, in conformity with well-established rule, be controlled by regard to any reasonable custom which is applicable to the demise and not inconsistent with the exception (*p*). A pre-historic chattel found beneath the surface of demised land is probably not within this exception, although it does not, whether as a chattel or as being part of the soil, pass by the demise (*q*). A grant of lands saving and reserving to the grantors liberty to get the minerals which should be found within them does not, at all events in the absence of other clauses in the deed raising that inference, amount to an exception of the minerals (*r*). Where minerals are excepted from a demise, a way-leave to the lessor for carrying them away (in compliance with a principle already mentioned (*s*)) will be implied (*t*); but the lessor's right to work the minerals will be subject to the lessee's right to have support to the surface (*u*), in the same way as when the minerals are themselves demised it is an implied term of the contract that, in the absence of words in the instrument to the contrary, that support shall always be given (*x*).

CHAP. I.—THE LEASE (*continued*).

DIV. IV.—THE TERM.

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Commencement.—In every lease the time at which it is to commence must, in the *habendum*, be stated with certainty. Thus a lease merely stating the commencement of the term as on a certain

(*p*) *Tucker v. Linger*, 8 App. Ca. 508.

(*q*) *Elwes v. Brigg Gas Co.*, 33 Ch. D. 562. Cp. *Boileau v. Heath*, [1898] 2 Ch. 301.

(*r*) *Sutherland (Duke of) v. Heathcote*, [1892] 1 Ch. 475; where it was held that the right to work them was not exclusive.

(*s*) *Supra*, at note (*g*); *Shep. Touch*. 100.

(*t*) *Cardigan (Lord) v. Armitage*, 2 B. & C. 197.

(*u*) *Proud v. Bates*, 34 L. J. Ch. 406.

(*x*) *Davis v. Treharne*, 6 App. Ca. 460; *Greenwell v. Low Beechburn Coal Co.*, [1897] 2 Q. B. 165; *New Sharleton Collieries Co. v. Westmorland (Lord)*, [1904] 2 Ch. 443, n.

day of a certain month, but without specifying the year, has been held to be void (*y*); though it would hardly seem that this result would now follow, at least where the omission can be supplied as a matter of reasonable inference (*z*). If a lease is made to begin from a date which is impossible, as if the *habendum* be from the 30th of February, the term will commence from the date the lease is delivered (*a*). Similarly, where the *habendum* refers expressly to the date of the lease, *e.g.*, to hold "from the date hereof," and that date be an impossible one, or not set forth at all, the "date" in the *habendum* means that of the delivery (*b*); but if the date of the lease referred to in the *habendum* be a sensible one, it means the actual date of the lease (*c*). So, again, where the *habendum* is "from the making thereof," or "from henceforth" (though the latter has been said to be equivalent to "from the day of the date" (*d*)), this refers also to the time of the delivery (*e*); and as the binding force of a deed dates from that time (*f*), the same rule applies where the *habendum* is from a date which is to be ascertained by reference to the time at which a lease takes effect. Hence, where the *habendum* of a lease was "from the 25th of March now last past," and there was evidence to show that the lease itself, though dated the 25th March, 1783, was not in fact executed till afterwards, it was held that the term commenced on the 25th March, 1783, and not 1782 (*g*).

It need hardly be remarked that in modern leases if the holding is from a feast day the new style is intended; nor, if the letting be by deed, is extrinsic evidence admissible to show that the old style was meant (*h*), though if not by deed it is (*i*). And the custom of the country is admissible evidence for this purpose (*j*).

Where the *habendum* is "from" a certain day, this will be construed to be either inclusive or exclusive of that day, according to the context and subject-matter, and so as to effectuate the deeds of the parties and not to destroy them (*k*). It has been said

(*y*) *Anon.*, 1 Mod. 180. As to the effect of taking possession under a void lease, see p. 11, *ante*.

(*z*) *Boddington v. Robinson*, L. R. 10 Ex. 270. See note at p. 272 of the report.

(*a*) Bac. Ab. Leases (L. 1).

(*b*) Co. Lit. 46 b.

(*c*) *Styles v. Wardle*, 4 B. & C. 908; *Doe v. Day*, 10 East, 427.

(*d*) *Llewelyn v. Williams*, Cro. Jac. 258.

(*e*) *Clayton's case*, 5 Co. 1 a.

(*f*) *Shep. Touch.* 72.

(*g*) *Steele v. Mart*, 4 B. & C. 272.

(*h*) *Doe v. Lea*, 11 East, 312; *Smith v. Walton*, 8 Bing. 235.

(*i*) *Den v. Hopkinson*, 3 D. & Ry. 507.

(*j*) *Doe v. Benson*, 4 B. & A. 588 (*Hogg v. Norris*, 2 F. & F. 246, *seemb. cont.*).

(*k*) *Pugh v. Duke of Leeds*, Cowp. 714.

that the tendency of the courts is towards the "exclusive" construction (*l*); but this appears to be incorrect (*m*).

If no time be fixed for the commencement of the term (*e.g.*, where the *habendum* is simply "to hold for twenty-one years") the term will, if the tenancy is created by deed, commence from the date of delivery (*n*). If it be created by an agreement not under seal which has the effect of a present demise (*o*), it will commence from the date of the agreement (*p*), unless it can be gathered from the agreement itself (*q*), or from parol evidence (*r*), that some other time was intended. But this does not apply to an executory agreement for a lease to be afterwards made, inasmuch as from its very nature something has to be done before the lease is granted; and such an agreement, in which no mention is made of a time for commencing the term, and which contains no materials for discovering it, will therefore be void (*s*). If, however, possession be taken under an agreement silent in the above respect, the term will commence from the time of entry (*t*).

A lease for years may be made to commence either at a present or at a future time; but leases are often expressed to commence from a day which is past (*u*), though in that case the lease relates back to such day for purposes of computation only (*x*). The *habendum* in a lease only marks the duration of the tenant's interest, and its operation as a grant is merely prospective (*y*); hence in point of interest the lease in such a case takes effect only from the time of delivery (*z*). It follows that the lessee will not be liable for breaches of covenant committed before that date (*a*).

Where the demise specifies the day on which the term is to commence, such day is to be treated in law as the first day of the tenancy, and it makes no difference that the instrument is only executed on that day, so that the tenant may not in fact have been in possession during the whole of it (*b*).

(*l*) See 4 Kent's Comm. 95, note (*b*), where the cases are collected.

(*m*) See *Russell v. Leedsam*, 14 M. & W. 574, at p. 582, per Parke, B.; and cf. *Sidebotham v. Holland*, [1895] 1 Q. B. 378, cited *infra*.

(*n*) Co. Lit. 46 b.

(*o*) See *ante*, p. 75.

(*p*) *Doe v. Benjamin*, 9 A. & E. 644; *Furness v. Bond*, 4 T. L. R. 457.

(*q*) *Sandill v. Franklin*, L. R. 10 C. P. 377.

(*r*) *Davis v. Jones*, 17 C. B. 625.

(*s*) *Marshall v. Berridge*, 19 Ch. Div.

233; *Oxford (Mayor of) v. Crow*, [1893] 3 Ch. 535. See p. 357, *post*.

(*t*) *Doe v. Mattheus*, 11 C. B. 675; *In re Lander*, [1892] 3 Ch. 41.

(*u*) *Enys v. Donnithorne*, 2 Burr. 1190.

(*x*) *Bird v. Baker*, 1 E. & E. 12;

Cooper v. Robinson, 10 M. & W. 694.

(*y*) *Shaw v. Kay*, 1 Exch. 412.

(*z*) *Jervis v. Tomkinson*, 1 H. & N. 195.

(*a*) *Shaw v. Kay*, *supra*. Cf. *Surtees v. Woodhouse*, [1903] 1 K. B. 396, cited *post*, p. 193.

(*b*) *Sidebotham v. Holland*, [1895] 1 Q. B. 378.

Although it is necessary, as already mentioned, that the commencement of the term be certain, it is not necessary that it should be stated expressly, or even that it should be known to the parties at the time the lease is made. It is sufficient that it should be capable of being definitely ascertained at the time the lease takes effect in interest or possession; for though until that time it may depend upon an event in its nature wholly uncertain, on the event happening the principle *id certum est quod certum reddi potest* applies, and the lease becomes valid and binding (c). Thus a lease may be made to commence from such a date as a given person may name (d), or as soon as the intended lessee shall pay a given sum of money (e), or after a life or lives in being (f), or upon the expiration or sooner determination of a term already subsisting in the premises (g). In this last case (that of a lease "in reversion") (h), if the subsisting term come to an end by surrender or forfeiture (i), or if there be really no such term in existence or such term be void (k), the lease will commence immediately. And where one parcel of land was demised to one person for ten years and a second parcel to another person for twenty years, and then a lease of both was made to a third person for forty years, *habendum* from the end or determination of the previous demises, it was held that the term granted by the last demise commenced (as to the first parcel) on the expiration of the ten years, and was not to be deferred until the twenty years for which the second was granted had also come to an end (l).

An instrument of demise, though sealed and delivered by the lessor, may be so delivered, not as a lease but as an escrow, *i.e.*, to take effect only upon the performance of a condition, such as the payment of a sum of money by the lessee (m). The question is one of intention of the parties, evidence being admissible to show what that intention was; and if it appear that the instrument was only meant to operate as an escrow, it will not operate as a lease, though purporting to commence immediately (m).

Duration.—The *habendum* in a lease must point out the period during which the enjoyment of the premises is to be had: so that

(c) Co. Lit. 45 b; Shep. Touch. 272, 273.

(d) Bac. Ab. Leases (L. 2).

(e) Co. Lit. 45 b.

(f) *Goodright v. Richardson*, 3 T. R. 462, per Lord Kenyon, C. J.

(g) *Bishop of Bath's case*, 6 Co. 34 b.

(h) *Ante*, p. 20.

(i) Bac. Ab. Leases (L. 1).

(k) *Id.*; Co. Lit. 46 b.

(l) *Windham's case*, 5 Co. 7 a.

(m) *Gudgen v. Besset*, 6 E. & B. 986.

the duration as well as the commencement of the term must be stated. The certainty of a lease as to its continuance must be ascertained either by the express limitation of the parties at the time the lease is made, or by reference to some collateral act which may, with equal certainty, measure the continuance of it, otherwise it is void (n). If the term be fixed by reference to some collateral matter, such matter must either be itself certain (*e.g.*, a demise to hold for "as many years as A. has in the manor of B.") (o), or capable before the lease takes effect of being rendered so (p) (*e.g.*, for "as many years as C. shall name") (q). Consequently, a lease to endure for "as many years as A. shall live" (r), or "as the coverture between B. and C. shall continue" (s), would not be good as a lease for years; although the same results may be achieved in another way, by making the demise for a fixed number (ninety-nine, for instance) of years determinable upon A.'s death or the dissolution of the coverture between B. and C. (t). Terms are, indeed, frequently limited in this way by naming an event upon the happening or non-happening of which they are defeated: *e.g.*, a lease for a certain period if the lessee (u), or if another person (x), shall so long live, or if B. shall continue parson of Dale (y), or if the tenant (z) or his licensee, being of a specified character (a), shall continue to occupy the premises (b), or in the service of the lessor (c). In modern leases, too, the term (as will be explained hereafter) is generally made determinable upon the failure of the lessee to perform the covenants which he has undertaken to observe (d).

If a lease for years be made to two persons, if they should so long live, or to one person if he and another should so long live, it will cease at once upon the death of either (e); but if the proviso be that it shall cease if the lessees should die during the term, by the death of one of them the lease does not determine (f). In

(n) *Bac. Ab. Leases* (L. 3). As to the effect of entry (under lease silent as to length of term) in creating a yearly tenancy, *cp. ante*, p. 11, and see *In re Stroud*, 8 C. B. 502.

(o) *Shep. Touch.* 274.

(p) *Bishop of Bath's case*, 6 Co. 34 b.

(q) *Co. Lit.* 45 b.

(r) *Shep. Touch.* 275.

(s) *Bac. Ab. Leases* (L. 3).

(t) *Shep. Touch.* 274.

(u) *Wright v. Cartwright*, 1 Burr. 282.

(z) *Randle v. Lory*, 6 A. & E. 218.

(y) *Shep. Touch.* 274.

(z) *Doe v. Clarke*, 8 East, 185.

(a) *Kehoe v. Marquess of Lansdowne*, [1893] A. C. 451.

(b) See *Doe v. Steward*, 1 A. & E. 300.

(c) *Wrenford v. Gyles*, Cro. Eliz. 643, where it was apparently held that such lease was not defeated by the lessor's death within the term.

(d) *Post*, p. 316, where the difference is explained between a limitation and a condition.

(e) *Bac. Ab. Leases* (L. 4); *Brudnell's case*, 5 Co. 9 a.

(f) *Co. Lit.* 219 b.

the same way a distinction may be drawn between a lease for a given number of years "if A., his wife, *or* any of their issue should so long live," and a similar lease "if A. *and* his wife *and* issue should so long live" (g).

If the demise be divisible in the sense that part of the term is set forth with certainty and the rest is wholly uncertain, it will be good as to the former part and void only as to the latter (h). Hence, an instrument by which the lessee undertook to pay specified but varying amounts of rent up to a certain date, and after that to pay a fixed yearly rent "till the end of the lease" (and no end to the lease was ever fixed), was held good for the time previous to such specified date only (i). On the same principle, a lease for years (without saying how many) has been held a good lease for two years, because "for more there is no certainty, and for less no sense in the words" (k). Similarly, where a tenant took possession under an agreement expressed to enure for a period of twelve months "with the option of a lease after the aforesaid time at the rental of" a specified sum *per annum*, it was held that he was entitled to retain possession for at least one year after the first twelve months, as the italicized words suggested that at least that period was within the contemplation of the parties (l).

It should be noticed that where a demise is expressed to enure for the "term," or the residue of the "term," granted by another lease, that word may be construed to intend either the time or the estate so granted; and such demise will not, therefore, necessarily be defeated if such other lease come to an end before its natural expiration (m).

The above rule requiring the term to be stated with certainty applies, it should be observed, only to leases for years; a lease generally of lands, if made by deed, is valid although no particular estate or interest is limited, the estate conveyed thereby being an estate for life (n).

A lease for life may be made for the life either of the lessee, or of some other person (o). *Primâ facie* a demise by one person to

(g) Bac. Ab. Leases (L. 4); Co. Lit. 225 a.

(h) *Say v. Smith*, Plowd. at p. 271.

(i) *Gwynne v. Mainstone*, 8 C. & P. 302.

(k) Bac. Ab. Leases (L. 3), citing *Bishop of Bath's case*, 6 Co. 34 b.

(l) *Austin v. Newham*, [1906] 2 K. B.

167. Kennedy, J., expressed the view, on the authority of *Kusel v. Watson*, 11 Ch. Div. 129 (referred to *infra*, p. 112), that he was entitled to a lease for his life.

(m) *Colles v. Richardson*, 7 Exch. 143.

(n) Co. Lit. 42 a. See *ante*, p. 16.

(o) Co. Lit. 41 b.

another for the term of his natural life means a demise for the life of the lessee; but this presumption may be rebutted (in favour of one for the life of the lessor) by regard to other parts of the instrument (*p*). Though a lease for the life of a person not in existence at the time it is granted is void, a lease for the lives of several persons is good, if one of them be not in existence, for the lives of the others (*q*). A lease for the lives of two persons does not determine by the death of one of them (*r*). No covenant will be implied in a lease for lives that the lives are all actually subsisting, even though the grantor expressly covenant that the lease is good for the lives therein mentioned (*s*).

To prevent a lessee for life or lives (*pur autre vie*) from continuing to hold after the death of his *cestui que vie* where evidence of such death is not easily obtainable, it has been enacted (*t*) that seven years' continuous absence beyond the seas or in the realm is to furnish presumptive evidence of such death (*u*), though any lessee dispossessed of his estate by force of this provision is to be reinstated and to recover the full profits he may have lost of the land on proof being afterwards forthcoming to the contrary (*x*). Sometimes the lessee expressly covenants to make it sufficiently appear within a specified time after notice that the *cestui que vie* is still living, and in that case it is not enough merely to give evidence from which his continued existence, though it might be inferred as a fact by some persons, might not be inferred by others (*y*). Provision has also been made (*z*) for the production before the Court, or persons appointed thereby, of the *cestui que vie*, upon the application of a lessor—who is entitled to an order as a matter of right (*a*)—founded on a belief that his death is concealed, and for inferring such death from non-compliance with the order (*b*). It is also enacted (*c*), that any lessee for life or lives holding over after the determination of his estate without the express consent of the person next entitled shall be adjudged a trespasser, and liable to such person for the full value of the profits received during his wrongful possession.

A lease cannot (apart from statute) be made to endure in perpetuity. An instrument, however, purporting to be such an

(*p*) *Doe v. Dodd*, 5 B. & Ad. 689.

(*q*) *Doe v. Edwards*, 1 M. & W. 553.

(*r*) *Hughes v. Crouther*, 13 Co. 66.

(*s*) *Coates v. Collins*, L. R. 7 Q. B. 144.

(*t*) 19 Car. 2, c. 6.

(*u*) Sect. 2.

(*x*) Sect. 5.

(*y*) *Randle v. Lory*, 6 A. & E. 218.

(*z*) 6 Anne, c. 18.

(*a*) *In re Isaac*, 4 My. & Cr. 11.

(*b*) Sect. 1, where the procedure to be followed is set out.

(*c*) Sect. 5.

assurance may operate as a grant of the fee simple subject to a rent-charge (*d*); or, if it cannot have that effect, it may, by entry and payment of rent (*e*), enure as a yearly tenancy at the rent reserved by the terms of the instrument (*f*).

In yearly tenancies the holding while the tenancy lasts being continuous from year to year (*g*) (so that a letting "for a year," or "for one year and no longer" (*h*), does not create in this sense a yearly tenancy at all), the duration of the term depends on the acts of the parties while the tenancy is running. A lease from year to year simply, "so long as both parties please," is but a lease for a year certain (*i*), even though it appear from other parts of the instrument that the parties clearly contemplated its lasting longer (*k*), and can, therefore, if the proper steps be taken (*l*), be determined at the end of the first year (*m*). So a letting "for one whole year, and so for two or three years or any such further term of years as the parties should think fit and agree," is, without a subsequent agreement, a lease for one year only (*n*). But a letting "for a year and so on from year to year," endures for two years at least (*o*); and so does a letting "not for one year only, but from year to year" (*p*). Similarly, a tenancy "for six months, and so from six months to six months, until determined by either party," is one for twelve months at least (*q*). It follows that in a letting "for one year certain, and so on from year to year" till determined by a specified notice, the terms as to notice are applicable, not to the first year, but only to the period after its expiration (*r*).

The wording of the instrument makes it at times a little difficult, in cases of the above kind, to decide what is the precise term which the lessee acquires by it. For instance, a letting "for twelve months certain and six months' notice to quit afterwards" has been held a tenancy for one year certain only, and therefore determinable (by notice) at the end of that time (*s*); while, on the

(*d*) *Sevenoaks, &c., Ry. Co. v. L. C. & D. Ry. Co.*, 11 Ch. D. at p. 635.

(*e*) See p. 11, ante.

(*f*) *Doe v. Gardiner*, 12 C. B. 319.

(*g*) *Ante*, p. 3. The other "periodic" tenancies, as there seen, stand on the same footing.

(*h*) *Cobb v. Stokes*, 8 East. 358.

(*i*) Bac. Ab. Leases (L. 3), citing *Legg v. Strudwick*, 2 Falk. 414.

(*k*) *Doe v. Mainby*, 10 Q. B. 473 (reported as *Doe v. Nainby*, 16 L. J. Q. B. 303).

(*l*) See *post*, pp. 600 *et seq.*

(*m*) *Doe v. Smaridge*, 7 Q. B. 957.

(*n*) *Harris v. Evans*, Amb. 329. The report of an earlier hearing of the case in 1 Wils. 262 is apparently incorrect.

(*o*) *Doe v. Green*, 9 A. & E. 658.

(*p*) *Denn v. Cartright*, 4 East, 29.

(*q*) *R. v. Chawton*, 1 Q. B. 247.

(*r*) *Cannon Brewery v. Nash*, 77 L. T. 648.

(*s*) *Thompson v. Maberly*, 2 Camp. 573.

other hand, a letting for five years with a stipulation that "after the expiration" of three years either party might determine it by six months' notice, ending at the time of year when the tenancy commenced, has been held a letting for four years at least (*t*). So a demise for three years, determinable on a six months' notice to quit, "otherwise to continue from year to year until the term shall cease by notice to quit at the usual times," was held a demise for three years at least, and the tenancy consequently not determinable sooner than by a six months' notice ending with the third year (*u*). The *habendum* is the proper place to look to in the lease for the purpose of ascertaining the true period of the letting; but the other parts of the instrument may be looked at, though, in order that they may control the *habendum*, they must establish clearly that it could not have been the intention that the *habendum* should operate according to its words (*x*).

Another not infrequent case, where the continuance of the term depends on the acts of the parties after the tenancy has commenced, is where a demise is made for a term of years (twenty-one, for instance) and power is given "to break" (usually at seven, or fourteen, or both) upon a notice of specified length being given by one of the parties to the other. And the legal effect of a demise "for seven, fourteen, or twenty-one years" is exactly the same (*y*). So a letting may be made for a definite period, with the option to the lessee at the end of that time of taking a lease, *e.g.*, for seven, fourteen, or twenty-one years (*z*). Where by a demise power is conferred on a tenant by giving a certain notice to remain on after the end of his term, this is merely a stipulation for a renewal of the tenancy, and does not operate to extend the original term (*a*). Sometimes a lease is made to enure for a definite term (*e.g.*, seven years), and afterwards from year to year (*b*).

It occasionally happens that in informal instruments the parties first provide for a "periodic" (*c*) tenancy (*e.g.*, from year to year), and then add a proviso against its determination by the lessor, so long as the rent is paid or other conditions performed by the lessee. Such cases are, of course, distinguishable from those where during the currency of a periodic tenancy the landlord for some

(*t*) *Gardner v. Ingram*, 61 L. T. 729, disapproving last-cited case.

(*u*) *Jones v. Nixon*, 1 H. & C. 48.

(*x*) *Strickland v. Maxwell*, 2 Cr. & M. 539.

(*y*) *Goodright v. Richardson*, 3 T. R. 462; *Ferguson v. Cornish*, 2 Burr. 1032.

As to notice to determine such a tenancy, see p. 601, *post*.

(*z*) *Waring v. King*, 8 M. & W. 571; *Christy v. Tancred*, 7 M. & W. 127.

(*a*) *Hand v. Hall*, 2 Ex. Div. 355.

(*b*) *Brown v. Trumper*, 26 Beav. 11.

(*c*) See *ante*, p. 3.

consideration enters into an agreement not to disturb the possession of the tenant during a specified period : an agreement, as will hereafter be seen (*d*), within the Statute of Frauds, and consequently if not in writing unenforceable by the tenant, even where he has executed the consideration upon which it is founded (*e*).

Considerable difficulty has arisen in deciding what is the precise term granted by these instruments. If the whole instrument is construed to be, not a present demise, but an agreement (*f*) contemplating a future demise (*g*) : or if, being a present demise, it contain, in addition to the proviso against its determination, an express agreement to grant a future lease (*h*),—the Court will, by a decree for specific performance (*i*), give effect to such a proviso (*k*), if the terms of the intended lease can be gathered from the instrument with sufficient certainty (*l*). Thus an agreement for letting at a yearly rent, the tenant to have a lease “whenever he may feel disposed” at the same rent, and not to be disturbed after expenditure in improvements on the premises, was construed, by virtue of the proviso against disturbance, to intend a lease for life ; but the landlord, being only himself a termor, was ordered to execute an underlease for the residue of his term less one day, if the tenant should so long live (*m*). If, however, such an instrument amount to an actual demise, the rule formerly prevailed that a proviso to such effect would be rejected (*n*) (courts of equity refusing in such case to interfere) (*o*), unless the instrument was by deed, and in other respects effectual to convey an estate for life ; for such a stipulation would be repugnant to the nature of the “periodic” tenancy (*p*). A demise, for example, at a yearly rent, the tenant not to be turned out so long as he paid the rent (*q*), or a demise at a weekly rent, the tenancy to continue until the lessors required the premises for their own purposes (*r*), have been held respectively to create a yearly or weekly tenancy only. It appears, however, to be clear that such a tenant would now, in a proper case, have a claim to specific performance of the

(*d*) *Post*, p. 635.

(*e*) *Sidebotham v. Holland*, [1895] 1 Q. B. 378.

(*f*) As to this, see *ante*, p. 75.

(*g*) *Browne v. Warner*, 14 Ves. 156, 409 ; *In re King's Leasehold Estates*, L. R. 16 Eq. 521.

(*h*) *Kusel v. Watson*, 11 Ch. Div. 129.

(*i*) As to this, see *post*, pp. 845 *et seq.*

(*k*) *Browne v. Warner*, *supra*.

(*l*) *Wood v. Beard*, 2 Ex. D. 30.

(*m*) *Kusel v. Watson*, *supra*.

(*n*) *Browne v. Warner*, *supra*.

(*o*) *Id.*, per Lord Eldon, L. C.

(*p*) *Cheshire Lines Committee v. Lewis*, per Brett, L. J., 50 L. J. Q. B. 121. See *post*, p. 605.

(*q*) *Doe v. Browne*, 8 East, 165 ; *Browne v. Warner*, *supra*.

(*r*) *Cheshire Lines Committee v. Lewis*, *supra*.

proviso, and that his interest would be one which *primâ facie* would endure for his life (s). Similarly, where a termor sub-let at a weekly rent, undertaking that such rent should not be raised during his own tenancy, it was held that the agreement, on its true construction, was an agreement, not for a weekly tenancy, but for a term to continue until the expiration of the lessor's interest (t).

Terms for years last during the whole anniversary of the day "from" which they are granted (u): hence a lease for years from a given day (e.g., the 25th of March) is not determined until the last moment of the day in question in the last year of the term (x). But where a demise for years, or from year to year, specifies the day on which it is to commence, the term expires, in the year in which it comes to an end, at midnight of the day before its anniversary (y).

CHAP. I.—THE LEASE (*continued*).

DIV. V.—THE REDDENDUM (RESERVATION OF RENT).

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Nature of rent.—Rent is a certain profit reserved or arising out of lands or tenements, whereunto the lessor may have recourse to distrain (z). It may, therefore, be reserved upon a demise of

(s) *Zimble v. Abraham*, [1903] 1 K. B. 577; and see this matter discussed *ante*, p. 16. In *Wood v. Davis*, 6 L. R. (1.) 50, it had also been held that a stipulation for continued enjoyment of the kind referred to, if qualified by an addition to the effect that it was to last only so long as the landlord was in possession himself, created *primâ facie* a tenancy for the life of the lessee.

(t) *Adams v. Cairns*, 85 L. T. 10.

(u) See p. 104, *supra*.

(x) *Ackland v. Luttley*, 9 A. & E. 879.

(y) *Sidebotham v. Holland*, [1895] 1 Q. B. 378, cited *post*, p. 609.

(z) Co. Lit. 47 a, 142 a. As to distress, see *post*, Book II.

the vesture or herbage of land, as the lessor in such a case may distrain the cattle upon the land (*a*). The right of distress is essential, and no payment to which such right is not necessarily incident is strictly rent; but sums reserved on demises, which, being made for the whole interest possessed by the grantor, operate as assignments (*b*), are considered payments in the nature of rent, and not sums in gross (*c*), although the reservation does not carry with it the right of distress (*d*). Payments, too, in the nature of rent are not infrequently met with—*e.g.*, in building agreements (*e*)—which cannot, in the absence of express stipulation, be distrained for, but which can be recovered by action on the contract, and this even before the person who undertakes to make them has entered into possession (*f*). These, however, are sums in gross, and not rent (*g*). Thus, though payments known as rent can be recovered on a demise of incorporeal hereditaments (*h*), rent properly so called cannot issue out of such hereditaments (*i*). It cannot, for instance, except in the case of a lease by the Crown (*k*), issue out of a mere privilege or easement (*l*), a right of common, a fishery, an advowson, an office, tithes, or the like (*m*). Nor can it issue out of anything in the nature of chattels personal (*n*); but where it is payable in respect of a furnished house or apartments, the whole is deemed to issue out of the realty (*o*), and hence it may be distrained for (*p*). (It may be mentioned here that, apart from distress, there is no *lien* for rent in such a case upon the tenant's goods (*q*).)

Where rent is reserved upon a demise—and it may be reserved immediately upon the grant of a future interest (*r*)—the whole of it is deemed to issue out of each and every portion of the land demised (*s*). If, however, the premises consist of two or more

(*a*) Co. Lit. 47 a.

(*b*) *Post*, p. 413.

(*c*) *Baker v. Gostling*, 1 Bing. N. C. 19; *Williams v. Haywood*, 1 E. & E. 1040. See p. 161, *post*.

(*d*) See *post*, p. 484.

(*e*) *Camden (Lord) v. Batterbury*, 7 C. B. N. S. 864; *Howlett v. Tarte*, 10 C. B. N. S. 813, per Willes, J.

(*f*) *Adams v. Hagger*, 4 Q. B. Div. 480.

(*g*) For illustrations, see *post*, pp. 477–486.

(*h*) Co. Lit. 47 a.

(*i*) *Id.*; *Butt's case*, 7 Co. 23 a.

(*k*) Bac. Ab. Rent (B.).

(*l*) See *Bussard v. Capel*, 8 B. & C.

141; *affd.*, *Capel v. Bussard*, 6 Bing. 150.

(*m*) See *ante*, p. 18.

(*n*) *Spencer's case*, 5 Co. 16 a; *ante*, p. 18.

(*o*) *Farewell v. Dickenson*, 6 B. & C. 251; *Brown v. Peto*, [1900] 1 Q. B. 346 (reported as *Browne v. Peto*, 69 L. J. Q. B. 141); *affd.*, [1900] 2 Q. B. 653.

(*p*) See as to this, and as to distress for rent of lodgings, pp. 480, 481, *post*.

(*q*) See *Thompson v. Lacy*, 3 B. & A. 283.

(*r*) Bac. Ab. Rent (B.).

(*s*) *Curtis v. Spitty*, 1 Bing. N. C. 756, per Tindal, C. J.; *Hargrave v. Shewin*, 6 B. & C. 34.

parcels, a separate rent may be reserved in respect of each (*t*), and such rents may be made payable in a different manner (*u*). But if in the lease one entire rent be reserved in the first instance, however it be subsequently apportioned therein in respect of the different parcels, this amounts in law to a reservation of one entire rent for the whole of the parcels (*x*). The distinction is important in view of the lessor's right of re-entry (*y*).

Rent must be a profit arising from the thing demised, and not a part of the thing demised itself (*z*), or in other words it must be a "reservation," and not an "exception" (*a*): thus, a reservation (so-called) of the vesture or herbage of the land cannot properly constitute a rent (*b*). But it need not necessarily arise in respect merely of the renewing produce of the land; it may, as in the case of mining or other royalties, be reserved in respect of a portion of the land itself which becomes exhausted, whether more or less rapidly, by the process of working (*c*). In the case of mining leases there is usually reserved, in addition to the royalty, a fixed minimum or "dead" rent, which remains payable, even though the lessee is unable to work the mine (*d*); for such a lease is really a sale out and out of a portion of the land (*e*). Nor is it necessary that the rent should consist of money; it may be rendered, for instance, in specific articles, such as wine (*f*), corn (*g*), or horses (*h*), or by manual services for the lessor's benefit, *e.g.*, shearing sheep (*i*), doing team-work (*k*), cleaning the parish church (*l*), &c., or partly by such services and partly in money (*m*).

The rent reserved must be certain; that is, the amount must either be certainly mentioned (*n*), or be such as by reference to something else may be reduced to a certainty (*o*). But the mere fact of its being fluctuating in amount does not make it uncertain,

(*t*) Gilb. Rents, 34, 35; Bac. Ab. Rent (E.).

(*u*) *Coomber v. Howard*, 1 C. B. 440.

(*z*) *Knight's case*, 5 Co. 54 b; Bac. Ab. Rent (E.); Gilb. Rents, 34, 35.

(*y*) See *post*, p. 316.

(*a*) Co. Lit. 47 a.

(*b*) *Ante*, pp. 94 *et seq.*

(*c*) Bullen, *Distress*, 20 (2nd ed.).

(*d*) *R. v. Westbrook*, 10 Q. B. at p. 203.

(*e*) *Bute (Lord) v. Thompson*, 13 M. & W. 487 (explained in *Clifford v. Watts*, L. R. 5 C. P. 577); *Phillips v. Jones*, 9 Sim. 519; *Ridgway v. Sneyd*, Kay, 627 (commenting on *Smith v. Morris*, 2 Bro. C. C. 311); *Jefferys v. Fairs*, 4 Ch. D. 448.

(*f*) *Gowan v. Christie*, L. R. 2 H. L. (Sc.) 273, per Lord Cairns.

(*g*) *Pitcher v. Tovey*, 4 Mod. 71.

(*h*) 2 Black. Comm. 41.

(*i*) Co. Lit. 142 a.

(*j*) Co. Lit. 96 a.

(*k*) *Marlborough (Duke of) v. Osborn*, 5 B. & S. 67.

(*l*) *Dos v. Benham*, 7 Q. B. 976.

(*m*) *Doe v. Morse*, 1 B. & Ad. 365; *Vyryan v. Arthur*, 1 B. & C. 410.

(*n*) See *Parker v. Harris*, 1 Salk. 262.

(*o*) Bac. Ab. Rent (A.); Co. Lit. 142 a; *Selby v. Greaves*, L. R. 3 C. P. 594, per Willes, J.; *Kendall v. Baker*, 11 C. B. 842. See further, *post*, p. 482.

for rent is certain if by calculation and upon the happening of certain events it becomes certain (*p*). And the time at which it is payable must be certain also (*q*).

The effect of the reservation of an additional rent upon breach of covenant by the lessee will be discussed later (*r*).

Reservation to lessor only.—The rent must be reserved to the lessor and not to a stranger (*s*); “rent is something paid by way of retribution for the land, and therefore ought to be made to him from whom the land passes” (*t*). Hence a reservation by the lessor of rent to his heir is void (*u*), unless the lease is only to commence after his own death (*x*); and where a person seised in fee made a lease (in which his son joined) to commence after his death, a reservation therein of rent to the son by name (not referring to him as heir) was held to be bad, although the son was in fact his heir-apparent (*y*). And just as there can be no reservation to a stranger during the life of the lessor, so rent cannot be reserved after his death to any person who has not the reversion (*z*); so that if, for instance, a tenant in fee demise for years, reserving an annual rent “to him, his heirs, executors, and assigns,” after his death (the executors taking nothing and the word being consequently rejected) the whole rent will enure to the heir (*z*). It will, however, always be safe to make the reservation to the lessor, “his heirs, executors, administrators, and assigns” (*a*); or the rent may be reserved *generally* (without saying to whom), for then the law will direct its devolution by making it follow the reversion (*b*). Thus, if tenant in fee lease for years reserving rent generally, it formerly enured after his death to his heirs (*c*), while if the lessor have himself only a term the rent will go to his executors (*d*). The rule, however, is different in the case of a “particular” reservation; thus, under a demise by tenant in fee reserving rent specially to himself (*e*), or to him and

(*p*) *Ex parte Voisey*, 21 Ch. Div. at p. 458, per Brett, L. J.

(*q*) Bac. Ab. Rent (A.); *post*, p. 483.

(*r*) See *post*, p. 154.

(*s*) Litt. s. 346; Co. Lit. 143 b.

(*t*) Gilb. Rents, 54.

(*u*) Co. Lit. 213 b.

(*x*) 2 Ro. Ab. 447.

(*y*) *Oates v. Frith*, Hob. 130.

(*z*) Gilb. Rents, 61.

(*a*) *Dollen v. Batt*, 4 C. B. N. S. at p. 768, per Byles, J.

(*b*) *Whitlock's case*, 8 Co. 69 b; *Sache-*

verel v. Frogate, 1 Vent. 161, per Hale, C. J.

(*c*) In the case, however, of such death taking place after the year 1897 this no longer holds, as (except where there are rights of survivorship) the property, notwithstanding any will, now vests in the executors (60 & 61 Vict. c. 65, s. 1). In the case of intestacy the rent would apparently enure to the heir until letters of administration were obtained: see *ante*, p. 57.

(*d*) 1 Wms. Exors. 629 (10th ed.).

(*e*) Co. Lit. 47 a.

his executors (*f*), or to him and his assigns (*g*), or to him, his executors, or assigns (*h*), or under a demise by tenant for years reserving rent to him and his heirs (*h*),—in each of these cases the rent determines upon the death of the lessor (*i*). It would seem, however, that the addition of the words “during the term” in each of the above reservations would prevent this result, and that in the case of tenants in fee the heir (or executor), and in the case of termors the executor, would then become entitled to the rent (*k*).

If a tenant for life with power of leasing make a demise reserving rent during the term to himself, his heirs, and assigns, it has been held that the rent after his death will go to the remainderman (*l*); and this applies even though the legal estate is vested not in the lessor but in trustees (*m*), provided the power under which the lease is made be recited therein (*n*). But in the case of leases made after the year 1881, difficulties of this nature are removed by the Conveyancing Act (*o*), which provides that rent reserved by a lease shall be annexed and incident to the reversion immediately expectant on the term granted by the lease, and shall be recoverable by the person from time to time entitled, subject to the term, to the income of the land leased (*p*). The Act, it is thus seen, expressly includes beneficial owners of the reversion (*q*).

When due.—The rent is usually reserved yearly (*r*); and in the absence of agreement to the contrary will be presumed to be reserved every year during the term, however it be made payable: *e.g.*, where in a lease for years rent is made payable by the lessee yearly (*s*), or twice a year, by even portions during the term (*t*), or at the four feasts (*u*), this will be construed to mean a *yearly* rent payable as stipulated throughout the term. If the rent reserved be a yearly rent (*i.e.*, either expressed to be a yearly rent, or so much *a year*), and no times for payment be specified, it will be payable yearly, and cannot therefore be demanded before the end of the year (*x*), unless it can be gathered from the whole

(*f*) Gilb. Rents, 66.

(*g*) *Wooton v. Edwin*, 12 Co. 36.

(*h*) Gilb. Rents, 66.

(*i*) *Sacheverel v. Frogate*, *supra*.

(*k*) *Id.*; Gilb. Rents, 67, 68.

(*l*) *Whitlock's case*, 8 Co. 69 b; Gilb. Rents, 70.

(*m*) *Grenaway v. Hart*, 14 C. B. 340.

(*n*) *Yellowly v. Gower*, 11 Exch. 274.

(*o*) 44 & 45 Vict. c. 41.

(*p*) Sect. 10. See *post*, pp. 439, 440.

(*q*) *Wolstenholme on the Conv. Acts*, p. 52 (9th ed.).

(*r*) Co. Lit. 47 a.

(*s*) Bac. Ab. Rent (F.).

(*t*) 2 Ro. Ab. 449.

(*u*) Bac. Ab. Rent (F.).

(*x*) *Coomber v. Howard*, 1 C. B. 440.

instrument of letting or from the dealings of the parties that their intention was otherwise (*y*). Nor will it make any difference that a right is reserved to the lessee to determine the tenancy by a notice expiring with any quarter (*z*), or that as a matter of fact rent has been paid for some time quarterly and not yearly, in deference to a wish expressed by the tenant to that effect after the letting has taken place (*a*). Where a lease contained two clauses of re-entry (*b*)—the one if the “yearly rent of 300*l.*” was in arrear for thirty days, and the other if the yearly rent “payable half-yearly at Lady Day and Michaelmas” was in arrear, it was held that the former contained a description of the amount of the rent to be paid annually, and the latter the times of payment, so that the lessor had the right to re-enter on non-payment of each half-year’s rent (*c*).

It is usual in reserving the rent to set forth certain specific days in the year on which it shall become payable; and the rent will in such case become payable on the first of such days that occurs after the commencement of the tenancy, irrespective of the order in which the days may be set forth in the *reddendum* (*d*). If, however, no specific days of payment are set forth, but the rent is simply made payable half-yearly or quarterly, the days of payment are not necessarily the so-called “quarter days,” but are computed half-yearly or quarterly from the making of the lease (*e*). But where there are special days of payment limited by the *reddendum*, the prevailing principle is that the rent must be computed according to the *reddendum* and not according to the *habendum* (*f*); hence, where by an agreement dated the 8th of September a house was let for seven years at an annual rent payable quarterly, the first payment to be made on the 25th of March following, it was held that a quarter’s rent only became due then, and that the rent for the first quarter was postponed till after the end of the term (*g*). The general rule, however, in the case of a discrepancy between the *habendum* and the *reddendum* is that the former will prevail; but the counterpart of the lease may always be looked at to explain the difference, and if the counterpart exhibit no such discrepancy, but agree throughout with the

(*y*) *Gore v. Lloyd*, 12 M. & W. 463.

Cp. *Bishop v. Goodwin*, 14 M. & W. 260.

(*z*) *Collett v. Curling*, 10 Q. B. 785.

(*a*) *Turner v. Allday*, Tyr. & G. 819.

(*b*) As to this, see *post*, p. 316.

(*c*) *Doe v. Golding*, 6 Moore, 231.

(*d*) *Hill v. Grange*, Plowd. at p. 171; Gilb. Rents, 49.

(*e*) Gilb. Rents, 50.

(*f*) *Tomkins v. Pincent*, 2 Ld. Ray 819.

(*g*) *Hutchins v. Scott*, 2 M. & W. 809.

reddendum of the lease, the counterpart (contrary to the usual rule) (*h*) will prevail over the lease, and the description in the *habendum* will be rejected as containing a clerical error (*i*).

Rent may be reserved payable in advance (*k*); but when this result is intended it should be clearly stipulated for (*l*). Thus, in a reservation of a yearly rent, "the rent to commence at Michaelmas, and to be paid three months in advance, such advance to be paid on taking possession," it was held that the stipulation for rent in advance applied only to the first quarter (*m*). But the inference that rent is payable in advance will be drawn when necessary to give effect to the obvious intention of the parties (*n*). Thus, a rent payable quarterly on the usual quarter days "and always if required a quarter in advance" is a rent always due in advance, whether so demanded or not, though no remedy for its non-payment can be enforced until after a demand has been made (*o*).

Although there is authority to the effect that rent is not due till midnight of the day upon which it is made payable by the reservation (*p*), it appears to be now settled that it is due throughout that day, but not *in arrear* till such day has elapsed (*q*). This matter, however, formerly derived its chief importance from the necessity of deciding upon the right to rent, as between the real and personal representatives of a lessor dying on the rent day: and this importance, in consequence of the Apportionment Acts (*r*), it has now lost. The rules of the common law as to the time for *demanding* rent will be given hereafter (*s*).

Where payable.—The rent reserved by a lease is payable on the land demised, because the land being the place appointed by law for a demand (*s*), the lessor cannot exercise his right of re-entry at common law (*t*) upon its non-payment without demanding it there (*u*). But this does not apply where the rent is reserved payable at a specified place away from the land (*x*), or where the lessee has entered into an express covenant to pay rent (*y*).

[*h*] *Shep. Touch.* 53. But this rule apparently only applies to deeds: see *Ingley v. Slack*, 6 T. L. R. 284.

[*i*] *Burchell v. Clark*, 2 C. P. Div. 88.

[*k*] For illustrations, see p. 484, *post*.

[*l*] See, e.g., *Doe v. Weller*, 1 Jur. 622 (but the report seems not very intelligible). As to the effect of payment of rent in advance where not so reserved, see *post*, p. 159.

[*m*] *Holland v. Palser*, 2 Stark. 161.

[*n*] *Hopkins v. Helmore*, 8 A. & E. 463.

[*o*] *London & Westminster Loan Co. v. L. & N. W. Ry. Co.*, [1898] 2 Q. B. 49.

[*p*] See *Duppa v. Mayo*, 1 Wms. Saund. at p. 413 (ed. 1871).

[*q*] *Dibble v. Bowater*, 2 E. & B. 564. See *post*, p. 513.

[*r*] See *infra*, pp. 120 *et seq.*

[*s*] See *post*, pp. 669, 670.

[*t*] As to this, see p. 669, *post*.

[*u*] Co. Lit. 201 b.

[*x*] Co. Lit. 202 a; *Borough's case*, 4 Co. 72 b.

[*y*] See p. 160, *post*.

Form of reservation.—The reservation of rent may be made in any words implying that a return of something which was not in the lessor before is to be made in lieu of the land given (*z*). Thus the expression in a demise “provided the lessee shall pay” (*a*), or “the lessee covenants to pay” (*b*), a rent mentioned is a good reservation; and so is the expression “at or under the yearly rent of £——” in an instrument of letting not under seal, for it amounts to an agreement to pay the rent (*c*).

Where the lessee has been in possession of premises for some time before accepting a demise of them, the *reddendum* as well as the *habendum* may be made to relate back to the time of his original entry (*d*).

Apportionment of rent.—Rent accruing due has often to be apportioned, both in respect of time and in respect of estate.

I. *In respect of time.*

Apportionment in respect of time is entirely the creation of statute. At common law, rent being in this respect unapportionable (*e*), where a tenant for life who had demised died, no rent for the period which elapsed between the last rent day and the time of such death was payable at all. By statute 11 Geo. 2, c. 19, however, it was enacted (*f*) that the executors or administrators of such tenant for life might recover from the lessee a proper proportion of the rent, according to the length of time between the last rent day and the death of the tenant for life. This enactment only applied to cases where by the death of the tenant for life the demise came to an end (*g*), for where the demise did not so determine but remained good as against the remainderman, the latter was entitled to the whole rent without apportionment (*h*).

By a later statute, however (*i*), the principle has been extended to all rents payable on demises which determine on the death of the persons making them (even though such persons be not strictly tenants for life), or on the dropping of the life or lives for which such persons were entitled to the hereditaments demised. And it is

(*z*) Bac. Ab. Rent (D.); Co. Lit. 47 a. See p. 163, *post*.

(*a*) *Harrington v. Wise*, Cro. Eliz. 486.

(*b*) *Drake v. Munday*, Cro. Car. 207.

(*c*) *Doe v. Kneller*, 4 C. & P. 3.

(*d*) *M'Leish v. Tate*, Cowp. 781.

(*e*) *Clun's case*, 10 Co. at p. 128 a;

note to *Ex parte Smyth*, 1 Swanst. 337; preamble to statute 33 & 34 Vict. c. 35, *infra*, p. 121.

(*f*) Sect. 15.

(*g*) *Mills v. Trumper*, L. R. 4 Ch. 320.

(*h*) *Botheroyd v. Woolley*, 5 Tyr. 522;

note to *Ex parte Smyth*, *supra*.

(*i*) 4 & 5 Will. 4, c. 22, s. 1.

further enacted (*k*) that all rents reserved on any lease by a tenant in fee, or for any life interest, or by any lease granted under any power, and all rents-charge and other rents, and all other payments of every description made payable or coming due at fixed periods shall be so apportioned, that on the death of any person interested in such rents or other payments, or on the determination by any other means whatsoever of the interest of such person, he and his executors, administrators, and assigns (*l*), shall be entitled to a proportion of such rents and other payments, according to the time which shall have elapsed from the last payment (*m*). Doubts have been entertained whether this section applies where the tenancy is determined in the middle of a quarter by the voluntary act either of the landlord (*n*) or (in cases where power is given him to do so) of the tenant (*o*). The section applies in terms only to cases in which the interest of the person interested in the rents to be apportioned is terminated by his death or that of another person; and it does not apply to the case of a tenant in fee, or provide for apportionment of rent between the real and personal representatives of such person whose interest is not terminated at his death (*p*). Nor does the Act give a right to any person to an apportioned part of the rent, if that person would not have had a right to the entire rent if the day for payment of the rent had arrived (*q*). And it does not apply to parol demises (*r*).

A more comprehensive Act, however, was passed in the year 1870 (33 & 34 Vict. c. 35) (*s*). This statute, which, like the earlier one (*t*), is not to extend to any case where it is expressly stipulated that no apportionment shall take place (*u*), but which applies to all instruments coming into operation after the Act, though made before the Act (*x*), and even to instruments coming

(*k*) Sect. 2.

(*l*) On the meaning of this word, see *In re Lord Anglesey's Estate* (or *Paget v. Anglesea*), cited *infra*, note (*q*).

(*m*) The section (which is not set out *verbatim*) contains also a proviso, the substance of which re-appears in the Act of 1870, s. 4; *infra*, p. 122.

(*n*) *Oldershaw v. Ho't*, 12 A. & E. 590.

(*o*) *Bridges v. Potts*, 17 C. B. N. S. 314.

(*p*) *Browne v. Amyot*, 3 Hare, 173; *Beer v. Beer*, 12 C. B. 60; *In re Clulow's Estates*, 3 K. & J. 689.

(*q*) *In re Lord Anglesey's Estate*, L. R. 17 Eq. 283, per Jessel, M. R. (re-

ported as *Paget v. Anglesea*, 43 L. J. Ch. 437).

(*r*) *In re Markby*, 4 My. & Cr. 484; *Mills v. Trumper*, L. R. 4 Ch. 320.

(*s*) As to an Act passed in the interval, whose effect in certain cases is to apportion rent, see 14 & 15 Vict. c. 25, s. 1; *post*, p. 715.

(*t*) 4 & 5 Will. 4, c. 22. See s. 3.

(*u*) Sect. 7. See *In re Meredith*, 67 L. J. Ch. 409.

(*x*) See *Capron v. Capron*, L. R. 17 Eq. 288; *Husluck v. Pedley*, L. R. 19 Eq. 271; *Constable v. Constable*, 11 Ch. D. 681. (In all those cases, however, the question arose under a devise in a will made before the Act, which was confirmed by a codicil made after it.)

into operation before the Act (*y*), provides (*z*) that "all rents . . . and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." "The apportioned part of any such rent . . . shall be payable or recoverable (*a*) in the case of a continuing rent . . . when the entire portion of which such apportioned part shall form part shall become due and payable and not before, and in the case of a rent . . . determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not so determined, and not before;" so that the Act in no way alters the date at which the rent becomes due (*b*).

It is further provided (*c*) that "all persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies, at law or in equity, for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances), as they respectively would have had for recovering such entire portions as aforesaid, if entitled thereto respectively; provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this Act or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this Act to the same." This proviso is intended for the case where there is a succession of interest in the reversion (*d*).

Although the object of the Act was only to divide between the persons who by reason of death, assignment, &c., become

(*y*) *In re Cline's Estate*, L. R. 18 Eq. 213; *Lawrence v. Lawrence*, 26 Ch. D. 795.

(*z*) Sect. 2.

(*a*) Sect. 3.

(*b*) *Re United Olub Co.*, 60 L. T. 665, cited *infra*, at note (*w*).

(*c*) Sect. 4.

(*d*) *Swansea Bank v. Thomas*, per Kelly, C. B., 40 L. T. at p. 560.

entitled to portions of accruing rent the amount when it becomes due (e), yet, as the result of decisions upon it, its effect is considerably wider, and if not to alter the contract between landlord and tenant by making rent due from day to day in every sense of the word (f), at all events such as to introduce what is virtually new law between them. Thus, where rent falls due at fixed periods (e.g., on the ordinary quarter days), and the tenancy is determined in the middle of a quarter, at common law the rent for such quarter was altogether lost (g); just as where a tenant left on a quarter day without notice, and the landlord let the premises to another tenant during the following "period," no rent could be recovered for the time up to such fresh letting (h). In the former case rent *pro rata* is now payable for the time the premises have been actually in the occupation of the tenant (i); whilst in the latter also it is thought that rent could be recovered down to such re-letting, although that re-letting would amount (k) to an eviction (l). Thus a tenant's trustee in liquidation who assigns over during the current quarter has been held liable for a proportionate part of the rent (i), and the same thing applies to a trustee in bankruptcy (m). So where premises already in mortgage were demised, and the tenant, in consequence of a threat of eviction from the mortgagee, determined by arrangement his tenancy to the mortgagor in the middle of a quarter, it was held that he was liable for an apportioned rent (n). The language of the enactment seems wide enough to include all tenancies that come to an end in the middle of a "period" *from whatever cause* (o), e.g., from eviction by title paramount (p); though it seems in one case to have been held that the Act does not apply in the case of an eviction resisted by the tenant at all (q).

The Act too has been held to apply to rent due from a company which went into liquidation in the middle of a quarter, so as to enable the landlord to prove for all rent due up to the day of the

(e) *Re United Club Co.*, 60 L. T. 665, per Kay, J.

(f) *In re Lucas*, 55 L. J. Ch. 101, per Bowen, L. J.

(g) *Grimman v. Legge*, 8 B. & C. 324, per Bayley, J.; *Slack v. Sharpe*, 8 A. & E. 366; *Walls v. Atcheson*, 3 Bing. 462.

(h) *Hall v. Burgess*, 5 B. & C. 332.

(i) *Swansea Bank v. Thomas*, 4 Ex. D. 94.

(k) See per Holroyd, J., in *Hall v. Burgess*, *supra*.

(l) See *infra*, at note (p), and *post*, p. 167.

(m) *Hopkinson v. Lovering*, 11 Q. B. D. 92.

(n) *Hartcup v. Bell*, C. & E. 19, Manisty, J.; *affd.* on appl., *id.*, 21, n.

(o) Per O'Brien, J., in case next cited.

(p) *Elridge v. Meldon*, 24 L. R. (1.) 91, following *Hartcup v. Bell*, *supra*.

(q) *Clapham v. Draper*, C. & E. 414, Mathew, J. The case is very shortly reported, and hardly seems a satisfactory authority.

commencement of the winding-up (*r*). (In the case where a receiving order is made against an ordinary tenant in the middle of a quarter, special provision is made by the Bankruptcy Act for proof by the landlord for rent apportioned to the date of the order (*s*).) But the landlord is not entitled to petition as creditor under the Companies Acts (*t*) in the middle of a quarter in respect of apportioned rent, because by force of sect. 3 no rent is then due (*u*). Moreover, the Act has been held not to apply to free a tenant, to whom his landlord had by will remitted all rent due at the time of his own decease, from liability for rent for the quarter during which the testator's death occurred, apportioned down to the date of such death (*x*). Nor does it render rent, before it becomes payable, capable of being attached under a garnishee order as a debt owing or accruing due (*y*). And the Act is only intended to apply to sums which are accruing but have not accrued due at the time when the apportionment is said to be required, and not to any sum duly and properly paid or accrued due before the happening of the incident which is said to necessitate it (*z*); so that it does not apply to rent which is payable in advance (*a*).

An important extension of the application of the Act, however, has been introduced by a recent decision. It has been held that the Act "not only affects the right to recover rent, but the liability as to the recovery of rent," so as to prevent the trustee of a bankrupt tenant, if he does not disclaim (*b*), from being liable for more than the rent apportioned from the date of the order of adjudication (*c*). It is, however, submitted that the Act (*d*) is (as regards rent) an "enabling" one in favour of landlords (*e*), that its only object, as already stated, is to divide the rent when it accrues due amongst rival claimants, and that though its effect in certain cases undoubtedly is to impose a liability on the tenant

(*r*) *In re South Kensington Stores*, 17 Ch. D. 161. As to rent accruing after that date, see pp. 528, 529, *post*.

(*s*) 46 & 47 Vict. c. 52, sched. 2, r. 19. (See on this point, *infra*, p. 125.) Cp. a similar result in Ireland, without the above provision, by aid (*inter alia*) of the Apportionment Act: *In re Leeks*, [1902] 2 I. R. 389.

(*t*) As to his right under these Acts to have assets set apart, when a liquidation takes place, to meet future rent and other liabilities of the lease, see Buckley on Companies, pp. 405 *et seq.* (8th ed.), and cases there cited.

(*u*) *Re United Club Co.*, 60 L. T. 665.

(*x*) *In re Lucas*, 55 L. J. Ch. 101

The decision professes to be based on the intention of the testator rather than on the construction of the Act.

(*y*) *Barnett v. Eastman*, 67 L. J. Q. B. 517.

(*z*) Per Romer, L. J., in next-cited case.

(*a*) *Ellis v. Rowbotham*, [1900] 1 Q. B. 740.

(*b*) See *post*, p. 451.

(*c*) *In re Wilson*, 62 L. J. Q. B. 628, cited *post*, p. 524.

(*d*) See the preamble.

(*e*) Per A. L. Smith, L. J., in *Ellis v. Rowbotham*, 16 T. L. R. 258: "Is not the Apportionment Act an Act passed for the benefit of landlords?"

where none existed before (*f*), it cannot, upon its true construction, take away an existing liability from the tenant, or from a person who by assignment is in the position of the tenant (*g*). Nor (it is submitted) can the decision be supported on the ground that in the particular case of assignment by bankruptcy, an apportioned rent, as has already been seen, is recoverable by the lessor as a provable debt; for while that provision gives him a right of proof which he would not otherwise have had, it in no way relieves the trustee from his personal liability for rent (*h*). Consequently the effect of the decision must be that in all cases where an assignment takes place in the middle of a quarter or other "period," the assignee's liability to the landlord when the rent becomes due is restricted to an amount apportioned from the date of the assignment, and for the reasons already given it is submitted that this cannot be regarded as correct (*i*). The lessee's covenant to pay rent (it may be added) is an engagement to pay a stated sum at stated times; and when the obligation is transferred upon assignment (by virtue, as will be seen hereafter, of privity of estate) to the assignee, it seems difficult to see how a statute with the wording and object of the Apportionment Act can have the effect, when one of the stated times occurs, of cutting down the express liability for one of the stated sums.

The above decision, however, has now been followed by courts of first instance, once in Ireland (where the matter is to a certain extent governed by special statute law) (*k*), and once in England (*l*); so that, at least for the present, the effect of the Act to restrict liability as above stated must be considered as established.

II. *In respect of estate.*

The other case in which rent has to be apportioned, viz. in respect of estate, is also of frequent occurrence. It arises either by

(*f*) See *supra*, p. 123.

(*g*) It may be pointed out that the effect of the decision in *In re South Kensington Stores*, *supra*, as will be seen on referring to the case as cited at p. 529, *post*, was also to remove or diminish the tenant's liability. But in this case leave of the Court had to be obtained, so that it may be regarded as somewhat special.

(*h*) *Ex parte Dresser*, 9 Ch. Div. 252, per Cotton, L. J.

(*i*) The decision appears also inconsistent with those of the C. A. in the last-cited case and in *Titterton v. Cooper*, 9 Q. B. Div. 473, in neither of which

cases, however, was the point as to the operation of the Apportionment Act apparently taken; though it is scarcely probable—especially having regard to the observations of Cotton, L. J., cited in the text—that it can have escaped the notice of the Court. It seems clear, too, that the full rent could always be recovered from the assignee by distress.

(*k*) *Glass v. Patterson*, [1902] 2 I. R. 660. A remarkable difference of opinion was shown, the judges who dealt with the case being equally divided.

(*l*) *Rochester (Bishop of) v. Le Fanu*, [1906] 2 Ch. 513.

the act of the parties or by act of law. It seems clear that the basis of apportionment should be one of value and not of mere quantity (*m*).

(1.) *By act of the parties*: (a) Of the lessor.—Where the lessor grants away part of his reversion (*n*), an apportionment of the rent is made (*o*); for rent being incident to the reversion, a proportionate part of it immediately passes with such grant (*p*), even though there be no mention of it therein (*q*). But the grantor and grantee cannot as between themselves apportion the rent so as to bind the tenant without his consent, unless the apportionment be made by a jury (*r*). Where, after a lessee who had entered into an express covenant to pay rent (*s*) had assigned the whole of his interest in the demised premises, the lessors assigned their reversion in a part thereof, it was held, in an action against the lessee, that the covenant in question was divisible, that the rent could be apportioned, although the action was founded upon privity of contract only, and that the lessee was liable in respect of the apportionment of that part the reversion of which remained in the lessors (*t*).

(b) Of the lessee.—In the same way, if the lessee lose the possession of a portion of the demised lands, *e.g.*, by surrender (*u*), or by forfeiture (*x*), the rent will be apportioned (*y*). So if the lessee being under an express covenant to pay rent (*z*) assigns his interest in the premises (*a*), and the assignee afterwards surrenders a part (*b*), or is evicted from part by title paramount (*c*), the lessee will be liable at least for an apportioned rent (*d*); and liability for his apportioned part can also be enforced under such circumstances against the assignee (*e*).

(*m*) See *Smith v. Malings*, Cro. Jac. 160.

(*n*) See p. 437, *post*.

(*o*) Co. Lit. 148 a.

(*p*) *West v. Lassels*, Cro. Eliz. 851.

(*q*) Gilb. Rents, 173.

(*r*) *Bliss v. Collins*, 5 B. & A. 876; and per Pollock, B., in next-cited case. See Dav. Prec. Conv. vol. 1, p. 452 (5th ed.).

(*s*) See p. 154, *post*.

(*t*) *Mayor of Swansea v. Thomas*, 10 Q. B. D. 48.

(*u*) See *post*, pp. 629 *et seq.*

(*x*) See *post*, pp. 649 *et seq.*

(*y*) Co. Lit. 148 a. Apportionment

of rent on a surrender of part of settled lands comprised in a lease is now specially provided for by 45 & 46 Vict. c. 38, s. 13, sub-s. 2.

(*z*) See p. 154, *post*.

(*a*) See *post*, pp. 415 *et seq.*

(*b*) *Baynton v. Morgan*, 22 Q. B. Div. 74.

(*c*) *Stevenson v. Lambard*, 2 East, 575. See p. 169, *post*.

(*d*) *Baynton v. Morgan*, *supra* (where the question as to his liability for the whole rent originally reserved was expressly left open); *Mayor of Swansea v. Thomas*, *supra*.

(*e*) *Stevenson v. Lambard*, *supra*.

(2.) *By act of law*.—Where the owner of lands in fee and lands for years made a lease of both at an entire rent, upon his death the rent was formerly apportioned between his real and personal representatives according to the annual values of the two kinds of lands respectively (*f*). So where a lease was made at an entire rent of lands of which the lessor was seised in fee and of other lands of which he was seised for his life (with a power of leasing), and the lease was invalid as to the latter lands from not being executed in accordance with the terms of the power, it was held upon the death of the lessor that the lease being good so far as concerned the lands in fee, an apportionment of the rent must be made (*g*). In the same way eviction by title paramount, from part of the premises, of the lessee (as of the assignee (*h*)), gives rise to apportionment (*i*). But when lands and goods are let together at a single rent, and the tenant is evicted from the lands, no apportionment will be made in respect of the goods, as the rent issues out of the lands only (*k*). Where, however, the mortgagor of a house let it furnished, and the tenant upon receipt of notice from the mortgagee paid the whole rent to him, it was held that the mortgagor might still recover for the use of the furniture, on the ground either that the rent might be apportioned, or that a new agreement might be implied to take the house at a reasonable rent from the mortgagee and to pay a reasonable amount to the mortgagor as a compensation for the use of the furniture (*l*).

Another instance of apportionment by act of law is where part of lands under demise are lost by the act of God or inevitable accident, as if they be permanently covered by the irruption of the sea (*m*). In the case of fire, however, the result, as will be seen (*n*), is different, because (it is said) the use of the land is not thereby taken away (*o*). Apportionment of rent is further specially provided for by certain statutes in cases where portions of lands under demise are required for public purposes (*p*), the most important of these cases being that of apportionment under the

(*f*) 1 Ro. Ab. 237; Bac. Ab. Rent (M. 2). See now *ante*, p. 57.

(*g*) *Doe v. Meyler*, 2 M. & S. 276.

(*h*) *Supra*, at note (*c*).

(*i*) *Tomlinson v. Day*, 5 Moore, 558; 2 B. & B. 680; explained in *Neale v. Mackenzie*, 1 M. & W. 747.

(*k*) *Emott v. Cole*, Cro. Eliz. 255. See p. 114, *supra*.

(*l*) *Salmon v. Matthews*, 8 M. & W. 827.

(*m*) 1 Ro. Ab. 236; Bac. Ab. Rent (M. 2).

(*n*) P. 170, *post*.

(*o*) Bac. Ab. Rent (M. 2).

(*p*) *E.g.*, for schools for the poor (12 & 13 Vict. c. 49, s. 1); for building churches (17 & 18 Vict. c. 32); for allotments (56 & 57 Vict. c. 73, s. 10 (2) & (4)), &c.

Lands Clauses Act, 1845 (*q*). Apportionment has also to be resorted to under the Agricultural Holdings Act, when a yearly tenant receives notice to quit a portion of his holding required by the landlord for purposes specified in the Act (*r*).

CHAP. I.—THE LEASE (*continued*).

DIV. VI.—COVENANTS.

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COVENANTS IN GENERAL.

How expressed.—Any words in a lease which show an agreement to do a thing (or, as it has been said, a promise that something is done already (*s*)), make a covenant (*t*). The use of the word is not necessarily restricted to demises under seal (*u*). No special

(*q*) 8 & 9 Vict. c. 18, s. 119. The section specifies the manner in which such apportionment is to be made.

(*r*) 46 & 47 Vict. c. 61, s. 41. See *post*, p. 618.

(*s*) *Shep. Touch.* 160. See, however,

as to the difference between contract and mere representation, *infra*, p. 147.

(*t*) *Com. Dig. Covenant* (A. 2); *Williams v. Burrell*, 1 C. B. 402.

(*u*) *Hayne v. Cummings*, 16 C. B. N.S. 421.

form is necessary (*x*): the words "yielding and paying," for example, in the *reddendum*, amount of themselves to a covenant to pay rent (*y*) (as the words "at or under" a certain rent in an instrument not under seal amount to an agreement to pay it) (*z*), and the words "and the lessee shall repair" to a covenant to repair (*a*). In the same manner a covenant is to be inferred from the use of the words "provided always, and it is hereby agreed" (*b*), or "provided always, and these presents are upon the express condition" (*c*) (a provision of this kind amounting also to a "condition") (*d*), or even "it is declared to be the intention," at least if followed by an engagement not to do any act which would have an effect contrary to the intention (*e*). And as long as the intention of the parties so to agree is clear, it is equally immaterial in what part of the lease the covenant may be found; it may be contained, for instance, even in a recital (*f*). Where it is sought to infer the existence of a covenant in a lease by spelling it out from the whole instrument, the intention to do or to abstain from the particular thing in question—as distinguished from the mere expectation that it will or will not be done—must clearly appear (*g*).

It must, however, be clear that the words are meant to operate as an agreement and not merely as words of condition or qualification (*h*): a covenant, for instance, by the lessee to repair "provided that the lessor finds timber" does not amount to a covenant by the lessor to find the timber (*i*), nor does a covenant by the lessee not to assign without the lessor's consent, "such consent not being arbitrarily withheld," amount to a covenant by the lessor not to arbitrarily withhold his consent (*k*). On the other hand, in an undertaking by the lessee to do certain specified repairs, the premises "being previously put in repair and kept in repair" by the lessor, it was held that there was an absolute covenant to

(*x*) *Bac. Ab. Covenant* (A.).

(*y*) 1 Ro. Ab. 519; *Porter v. Sweetnam*, Sty. 406; *Iggulden v. May*, 9 Ves. at p. 330. See *post*, p. 163.

(*z*) *Doe v. Kneller*, 4 C. & P. 3. Cf. *ante*, p. 120.

(*a*) *Brett v. Cumberland*, 1 Ro. Ab. 518.

(*b*) *Bac. Ab. Covenant* (A.).

(*c*) *Brookes v. Drysdale*, 3 C. P. D. 52.

(*d*) See *post*, p. 317.

(*e*) *Rigby v. G. W. Ry. Co.*, 14 M. & W. 811.

(*f*) *Sampson v. Easterby*, 9 B. & C. 505; *affd.*, *Easterby v. Sampson*, 6 Bing. 644.

(*g*) *Re Cadogan and Hans Place Estate*, 73 L. T. 387.

(*h*) *Wolveridge v. Steward*, 1 Cr. & M. 614, per Lord Denman, C. J.

(*i*) *Com. Dig. Covenant* (A. 3).

(*k*) *Treloar v. Biggs*, L. R. 9 Ex. 151; *Sear v. House Property Society*, 16 Ch. D. 387. See *post*, p. 271.

repair by the latter (*l*). So where a lease of lands for a colliery contained a covenant by the lessees to connect at their own expense the lands with a neighbouring canal by a railway, the lessor "giving land to be marked out by him" for the purpose, and such railway was necessary for the proper working of the colliery, it was held that there was an absolute engagement by him to provide such land (*m*).

It is now provided by statute (*n*) that a covenant is to be deemed to be made with the covenantee, his executors and administrators (or, in the case of land of inheritance, his heirs) and assigns, and to have effect as if executors, administrators (or heirs), and assigns were expressed.

Construction.—A covenant, like any other contract, is to be construed according to the intent of the parties as expressed by their own words (*o*), and by regard to the whole of the instrument (*p*) and the surrounding circumstances of the case (*q*); it being also a rule that if the words are doubtful, that construction is to be taken which is most strong against the covenantor (*r*). Where, for instance, a lessee covenanted to plough the premises demised to him, "except the rabbit warren and sheep walk," it was held that this amounted to a covenant not to plough the excepted portions (*s*); and where the covenant was at all times and seasons of burning lime to supply the lessor and his tenants with lime at a certain price, it was held that the lessee had bound himself thereby to burn lime at all such seasons (*t*). On the other hand, an undertaking by the lessee not to use the premises for any other than a specified purpose does not amount to an affirmative covenant to use them for that purpose (*u*). Sometimes a covenant is expressed so as to have an "alternative" operation, *i.e.*, to do something, and in case it be not done to do something else; and such a covenant will not be broken unless a breach of it in both its branches can be shown (*v*). Covenants by the lessee to do (or

(*l*) *Cannock v. Jones*, 3 Exch. 233 (reported as *Connock v. Jones*, 18 L. J. Ex. 204), cited *post*, p. 216. (There was no appeal on this point.) Cp. *Wood v. Copper Miners' Co.*, 7 C. B. 906.

(*m*) *Acraman v. Price*, 24 L. T. 487.

(*n*) 44 & 45 Vict. c. 41, s. 58. This section applies only to covenants made after the year 1881.

(*o*) Bac. Ab. Covenant (F.).

(*p*) Per Lord Ellenborough, C. J., *Iggulden v. May*, 7 East, at p. 241.

(*q*) *Mason v. Cole*, 4 Exch. 375, per Alderson, B.

(*r*) Bac. Ab. Covenant (F.); *Lore v. Pares*, 13 East, 80, per Bayley, J.

(*s*) *St. Albans (Duke of) v. Ellis*, 16 East, 352.

(*t*) *Shrewsbury (Earl of) v. Gould*, 2 B. & A. 487.

(*u*) *Doe v. Guest*, 15 M. & W. 160, cited p. 244, *post*.

(*v*) *Richards v. Bluck*, 6 C. B. 427, cited *post*, p. 292.

not to do) something, with an undertaking in case the thing specified be not done (or be done) to pay an additional rent, sometimes, but not always, belong to this class (*y*). A covenant will not be construed as giving a lessor the power of derogating from his own grant (*z*), if the words are fairly capable of another construction (*a*).

In the case of negative or restrictive covenants, the lessee not infrequently undertakes, not merely to abstain from certain acts himself, but also that he will not "suffer" or "permit" them to be done; but his liability upon an undertaking of this kind *primâ facie* only extends to the acts of persons who stand towards him in the relation of agent or servant, and not (for instance) to those of an underlessee (*b*). Nor does the mere fact that the restrictive covenants contained in the underlease are less stringent than those in the lease entail the result that he has permitted or suffered them himself (*c*).

In accordance with established rule, if any words in a covenant have obtained, by force of local custom, a peculiar sense in application to a particular subject-matter, parol evidence of such custom will be admissible in the construction of the covenant (*d*).

Any person claiming to be interested under a lease may now (*e*), in any Division of the High Court, apply by originating summons—to be served upon such persons as the Court may think fit, and supported by such evidence as the Court may require—for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested; but the Court is not bound to determine any such question if it thinks it ought not to be determined on originating summons.

Joint and several covenants.—A question which frequently arises in the construction of covenants is whether—in the case where there is more than one lessee—the covenants are joint or several. (Where there is more than one *reversioner*, the corresponding question *as regards covenantees*, which formerly often gave rise to

(*y*) See *post*, p. 154.

(*z*) See *ante*, p. 91.

(*a*) *White v. Harrow*, 86 L. T. 4.

(*b*) *Wilson v. Twamley*, [1904] 2 K. B. 99; *Tolman v. Portbury*, L. R. 5 Q. B. 288. As to injunction, however, in such cases, see *post*, p. 425.

(*c*) *Prothero v. Bell*, 22 T. L. R. 370.

(*d*) *Smith v. Wilson*, 3 B. & Ad. 723; *Tudgay v. Sampson*, 30 L. T. 262.

(*e*) Under R. S. C. 1883, O. 54 A. (R. S. C. 1893, r. 23); *Bevan v. Chambers*, 12 T. L. R. 417; *Farlow v. Stevenson*, [1900] 1 Ch. 128.

difficulties in deciding who was entitled to sue (*f*), is not, in consequence of the large powers of amendment in respect of parties now possessed by the Court under the Judicature Acts (*g*), any longer of so much importance. It may, however, be stated that though where a covenant is joint, one of several covenantees cannot sue alone upon it—and upon his death its benefit survives wholly to the others (*h*)—yet where the reversion of a single lessor becomes vested in persons with separate interests, such as tenants in common, any covenant in the lease made with the lessor resolves itself into separate covenants, and each covenantee can sue upon it in respect of his own interest (*i*.) With regard to lessees, the distinction is, for the same reason, now chiefly material (*k*) on the happening of the death of one of the covenantors, as his estate will or will not be liable according as the covenant is several or joint (*l*); but of course covenants may be, and frequently are, expressed to be both joint and several (*m*), in which case such liability will attach though the whole interest under the lease pass to the survivor or survivors (*n*).

Where in a demise to a number of persons covenants are expressed to be entered into by "the lessees," the fact that it is stipulated that when the context permits the word "lessees" shall include "their executors, administrators, and assigns" will not prevent the covenant from being joint (*o*). If the words too are expressly joint, *e.g.*, if the lessees covenant generally *for themselves*, or that they *or* one of them will perform the thing agreed, the covenant is joint (*p*), nor will it make any difference that the *habendum* in the lease is expressly to them as tenants in common and not as joint tenants (*q*); but if the words are not expressly joint, the covenant will be construed to be joint or several, according to the interest of the parties appearing on the face of the deed (*r*). When covenants follow one another in a lease, general

(*f*) *Foley v. Addenbrooke*, 4 Q. B. 197; *Bradburne v. Bolfield*, 14 M. & W. 559; *Thompson v. Hakevill*, 19 C. B. N. S. 713.

(*g*) R. S. C. 1883, O. 16, r. 11.

(*h*) *Southote v. Hoare*, 3 Taunt. 87. See now 44 & 45 Vict. c. 41, s. 60.

(*i*) *Roberts v. Holland*, [1893] 1 Q. B. 683, cited *post*, p. 435.

(*k*) See *Lloyd v. Dimmack*, 7 Ch. D. 398.

(*l*) See *White v. Tyndall*, 13 App. Ca. 263. As to liability, however, in the case of a *partnership*, see Lindley, 222 (7th ed.).

(*m*) See, *e.g.*, *Burns v. Bryan*, 12 App. Ca. 184, and see the whole question discussed in *Leake on Contracts*, pp. 297 *et seq.* (5th ed.).

(*n*) *Enys v. Donnithorne*, 2 Burr. 1190.

(*o*) *Boyce v. Edbrooke*, [1903] 1 Ch. 836.

(*p*) *Platt on Covenants*, p. 117; *Levy v. Sale*, 37 L. T. 709.

(*q*) *White v. Tyndall*, 13 App. Ca. 263.

(*r*) See *Sorsbie v. Park*, 12 M. & W. 146, per Parke, B.; notes to *Eccleston v. Cliphsham*, 1 Wms. Saund. 162 (ed. 1871).

words at the head of them, by which it is expressed that the lessees "jointly and severally covenant in manner following," will be construed to apply to all the covenants, and not merely to the first (s); and, similarly, where there was a covenant by a lessee and his surety to pay the rent, and further that the lessee should repair, it was held that the covenant to repair was a joint covenant by both, even though it was expressly recited that the object of the suretyship was to secure payment of the rent (t).

Dependent and independent covenants.—The question whether, when two or more covenants in a lease are set out together, liability in respect of one of them is contingent or not upon the performance of the other is to be decided, not upon merely technical words, nor even upon the relative position of the covenants in the lease, but upon the intention of the parties to be gathered from the whole instrument (u). Where it was agreed by the lessor that the lessee should have power to determine the lease upon giving a certain notice, "all the arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessee having been duly observed and performed," it was held that performance of the covenants was a condition precedent to the exercise of such power by the lessee (x). So a covenant by the lessor to renew (y) the lease at the end of the term, "upon the lessee paying the rent and performing the covenants of the present lease," has been held to be dependent upon such payment and performance (z). But if one party covenant generally to do one thing, the other party doing (a) another (e.g., the lessor to give quiet enjoyment, the lessee paying the rent reserved by the lease (b), or the lessee to surrender a part of the premises upon notice, the lessor paying compensation for money expended (c)), performance of the latter covenant is not a condition precedent to liability on the former (d); and the same result follows where a covenant goes to *part* of the consideration on both sides (e). The fact that the right of determination

(s) *Northumberland (Duke of) v. Errington*, 5 T. R. 522.

(t) *Copland v. Laporte*, 3 A. & E. 517.

(u) See *Porter v. Shephard*, 6 T. R. 665, per Lord Kenyon, C. J.

(z) *Grey v. Friar*, 4 H. L. C. 565; affirming *Friar v. Grey*, 5 Exch. 584 (Ex. Ch.).

(y) As to this, see p. 306, *post*.

(e) *Bastin v. Bidwell*, 18 Ch. D. 238.

(a) The present participle being used in setting out the covenant.

(b) *Dawson v. Dyer*, 5 B. & Ad. 584; *Edga v. Boileau*, 16 Q. B. D. 117.

(c) *Doe v. Kennard*, 12 Q. B. 244.

(d) Leake on Contracts, p. 460 (5th ed.); notes to *Pordage v. Cole*, 1 Wms. Saund. 548 (ed. 1871).

(e) 1 Wms. Saund., *ubi sup*.

and renewal is in every sense a privilege to the lessee (*f*) is perhaps the real ground of distinction between the two classes of cases, rather than the slight difference in the words made use of.

The tendency of the courts in construing covenants of this kind is always in the above direction, *i.e.*, to regard them, if possible, as independent (*g*). Where, for instance, a lessor undertook to indemnify his lessee against payment of rent to the head landlord—and an undertaking to this effect has been implied in an agreement for letting part of a house from a clause stipulating that the tenant “shall be liable only” to the rent reserved (*h*)—it was held to be no answer to the lessee’s claim in respect of a distress made for such rent (*i*) that his own rent was in arrear to a greater amount, inasmuch as payment of that rent was not a condition precedent to the lessor’s liability on his undertaking (*k*). So where an agreement was entered into to grant a lease upon payment of a specified sum by the intended lessees, who agreed to accept the lease and execute a counterpart, it was held that the granting of the lease was not a condition precedent to the right to demand payment of the money (*l*).

The question just discussed sometimes presents itself when a lessee upon entering into a certain undertaking agrees in the event of its breach to pay compensation, the amount of which in case of difference is to be settled by arbitration. In such a case arbitration is not a condition precedent to the right of action, unless there be a stipulation either expressly to that effect, or impliedly by agreeing that an action shall only be brought for the sum named by the arbitrator (*m*). This latter inference, however, will be drawn when it appears upon the true construction of the whole agreement that such was the intention of the parties, *i.e.*, where the agreement is really indivisible and does not contain a separate and absolute undertaking to pay (*n*). It may be mentioned here that leases

(*f*) *Bastin v. Bidwell*, *supra*, per Kay, J.; *Finch v. Underwood*, 2 Ch. Div. 310, per James, L. J.

(*g*) *Newson v. Smythies*, 3 H. & N. 840, per Pollock, C. B. Other examples of such covenants will be found *post*, pp. 216–218.

(*h*) *Evans v. Curtis*, 2 C. & P. 296.

(*i*) The authority to distrain in such a case must be properly shown: *Jones v. Buckley*, 2 Jur. 204.

(*k*) *Briant v. Pilcher*, 16 C. B. 354. For a case where a claim on an implied indemnity of the kind here spoken of

failed on the ground that the lessee (to whom the lessor had parted with the whole of his interest) had in effect undertaken to pay the rent distrained for himself, see *Upton v. Fergusson*, 3 Moo. & Sc. 88.

(*l*) *Baggallay v. Pettit*, 5 C. B. N. S. 637.

(*m*) *Dawson v. Fitzgerald*, 1 Ex. Div. at p. 260. As to the right, however, to have the action stayed, see *infra*.

(*n*) *Babbage v. Coulburn*, 9 Q. B. D. 235; *affd.*, 52 L. J. Q. B. 50.

sometimes contain, like commercial contracts, a general arbitration clause (*o*), and when that is the case it confers the usual right to have actions stayed (*p*). In the case of agricultural leases the arbitration will, after the year 1908, be before a single arbitrator, under the provisions of the Act hereinafter referred to (*q*), notwithstanding any agreement to the contrary (*r*).

Impossible and illegal covenants.—A covenant in a lease to do something which is *impossible* by law is void, or becomes void when its performance becomes impossible (*s*). But a covenant is not void merely because its performance is impossible in fact, unless according to the true intention of the parties the covenant was conditional on performance being possible (*t*). Absolute impossibility is here referred to, and not of course mere inability arising out of circumstances purely relative to the covenantor (*u*). And such an intention will be presumed when performance depends on the existence of a specific thing, whether the impossibility is caused by an event existing (but unknown to the parties) at the time of the demise (*x*), or by an event happening afterwards, but before the time for the fulfilment of the contract (*y*). Nor is it essential to the application of this principle that the direct subject of the contract should perish or fail to be in existence at the date of performance of the contract, as it is sufficient if a state of things or condition contained in the contract and essential to its performance should so perish or fail; and such state of things or condition may either be expressed in the contract or may be made to appear by extrinsic evidence to have been assumed by the parties to be its basis, if the event which causes the impossibility is of such a character that it cannot reasonably be supposed to have been in their contemplation when the contract was made (*z*). The contract, however, remains a perfectly good contract down to the time when the fact of the impossibility has been ascertained,

(*o*) See, e.g., *Wade-Gery v. Morrison*, 37 L. T. 270.

(*p*) See 52 & 53 Vict. c. 49, s. 4.

(*q*) See *post*, pp. 734 *et seq.*

(*r*) 6 Edw. 7, c. 56, ss. 1 (2), 9.

(*s*) Pollock on Contracts, p. 405 (7th ed.), citing *Baily v. De Crespigny*, L. R. 4 Q. B. 180, and *cp. Doe v. Rugeley*, 6 Q. B. 107. But this does not mean that where a statute actually in force at the time of letting prevents the performance of a covenant, the covenantor will be excused from paying damages: see

Budd-Scott v. Dantell, [1902] 2 K. B. 351, cited *post*, p. 304.

(*t*) Pollock, p. 400.

(*u*) *Id.*, at p. 384. The rule in *Paradine v. Jane*, Aleyn, 26, and similar cases (referred to *post*, p. 169) falls under the latter head: Pollock on Contracts, p. 410.

(*x*) *Clifford v. Watts*, L. R. 5 C. P. 577.

(*y*) See *Taylor v. Caldwell*, 3 B. & S. 826. *Cp. In re Hull and Menz (Lady)*, [1905] 1 K. B. 588, cited *post*, p. 293.

(*z*) *Krell v. Henry*, [1903] 2 K. B. 740.

and the parties are only excused from further responsibility under it; so that (except where it contains some condition express or implied to the contrary (a)) any payment previously made and any legal right previously accrued will not be disturbed (b). Where performance by the lessee of a covenant in a lease has become impossible by reason of the act of the lessor, the latter cannot sue for a breach of which that act has been the immediate cause (c).

If a lease be made for the purpose of carrying out an object which is *illegal*, all the covenants which it contains are void (d). So a particular covenant in a lease may be void on the ground of illegality, as, for example, when it operates in general restraint of trade (e).

Penal covenants.—Sometimes performance by the lessee of the covenants of a lease is secured by a bond (f) or by a penalty (g). Where the lease provides for the payment of a lump sum upon the non-performance of any one of many obligations differing in importance (h) which the lease contains, such a sum is *prima facie* strictly a penalty (i), and *à fortiori* where at least one of such obligations is either (like that for the payment of rent) for the payment of an ascertained smaller sum, or is of such a character that the damage sustained by its breach must necessarily be small (k). The landlord may in such a case either sue for the penalty, or disregarding the penalty proceed upon the breach of covenant (l). In either case he can only recover the damages actually sustained, though if he elect to sue for the penalty he obtains judgment for the whole amount thereof, which remains as a security against further breaches (m). But if the agreement for the payment has reference to a single obligation the breach of which is attended with damage uncertain in amount and incapable

(a) See *Elliott v. Crutchley*, [1904] 1 K. B. 565; *affd.*, [1906] A. C. 7.

(b) *Chandler v. Webster*, [1904] 1 K. B. 493.

(c) *Cornevall v. Dawson*, 24 L. T. 664.

(d) *Gas Light, &c., Co. v. Turner*, 6 Bing. N. C. 324; cf. *Smith v. White*, L. R. 1 Eq. 626, cited *post*, p. 430. For cases as to illegality, see *post*, p. 171.

(e) *Hinde v. Gray*, 1 M. & Gr. 195. See as to the present state of the law on this subject, Pollock on Contracts, pp. 352 *et seq.*

(f) *Chapman v. Chapman*, Cro. Car. 76; *Laineon v. Tremere*, 1 A. & E. 792.

(g) *Stancliffe v. Clarke*, 7 Exch. 439.

(h) See *Stegmann v. O'Connor*, 81 L. T. 627; *Diestal v. Stevenson*, [1906] 2 K. B. 345.

(i) *Willson v. Lore*, [1896] 1 Q. B. 626; *Law v. Local Board of Redditch*, [1892] 1 Q. B. 127, per Lord Esher, M. R.; *Elphinstone v. Monkland Iron Co.*, 11 App. Ca. 332, per Lord Herschell, L. C.

(k) *Wallis v. Smith*, 21 Ch. Div. 243.

(l) *Low v. Peers*, 4 Burr. at p. 2228, per Lord Mansfield, C. J.

(m) 8 & 9 Will. 3, c. 11, s. 8. See 2 Chit. Arch. 1279 (14th ed.).

of being ascertained (*n*) (especially if the sum to be paid bears a strict proportion to the extent to which the obligation is left unfulfilled, and if the compensation is not shown to be extravagant in relation to the injury sustained), the whole of the amount agreed upon is payable as liquidated damages (*o*). The question is one of the intention of the parties (*p*), and the name which they have given to the sum stipulated to be paid, though affording an indication of what that intention was (*q*), is not in itself conclusive of the matter (*r*). Where the stipulation is for liquidated damages, the fact that the sum in question has been deposited by one party with the other is a material element in drawing the inference that the contract expresses their intention correctly (*s*).

The criterion of whether a sum—be it called penalty or damages—is truly liquidated damages, and as such not to be interfered with, or is truly a penalty, which covers the damage if proved but does not assess it, has been expressed as one to be found in the consideration whether the sum stipulated for can or cannot be regarded as a “genuine pre-estimate of the creditor’s probable or possible interest in the due performance of the principal obligation” (*t*).

Covenants dehors the lease.—Underleases.—Besides the covenants contained in the lease itself, it frequently happens that a party acquiring a leasehold interest incurs liability on other covenants also. This happens usually by reason of his lessor being either under covenants with the owners of adjoining premises (*u*), or only a termor under a lease himself, the latter being the ordinary case of the grant of an underlease. In both these cases, as will be explained more fully hereafter (*x*), the lessee will incur liability on covenants of a *restrictive* character, of which notice either actual or constructive can be imputed to him. No action at law, however (except, of course, in actual contract), will lie upon a covenant

(*n*) *Willson v. Love*, *supra*, per Rigby, L. J.; *Ward v. Monaghan*, 11 T. L. R. 409, 529.

(*o*) *Elphinstone v. Monkland Iron Co.*, *supra*, per Lord Herschell, L. C., and Lord Watson; *Law v. Local Board of Redditch*, *supra*; *Howard de Walden (Lord) v. Barber*, 19 T. L. R. 183; *Clydebank Engineering Co. v. Don Joid, &c., Castaneda*, [1905] A. C. 6.

(*p*) *Law v. Local Board of Redditch*, *supra*, per Lopes, L. J.; *Magee v. Larell*, L. R. 9 C. P. 107, per Lord Coleridge, C. J.

(*q*) *Willson v. Love*, *supra*; *Ward v.*

Monaghan, *supra*; *Diestal v. Stevenson*, *supra*.

(*r*) *Elphinstone v. Monkland Iron Co.*, *supra*; *Barton v. Capewell, &c., Co.*, 68 L. T. 857; *In re White*, 17 T. L. R. 461. Most of the authorities on the subject will be found collected in the judgment of Jessel, M. R., in *Wallis v. Smith*, *supra*.

(*s*) *Pye v. British, &c., Syndicate*, [1906] 1 K. B. 425.

(*t*) *Public Works (Commissioners of) v. Hills*, [1906] A. C. 368.

(*u*) See, e.g., *Wilson v. Hart*, L. R. 1 Ch. 463.

(*x*) See p. 424, *post*.

unless there be privity of estate between the parties (*y*); hence, in the case of an underlease, the underlessee cannot be sued in an action for breach of covenant by the original lessor (*y*), even though the rent by such underlease be made payable to the latter (*z*). The same principle too applies to the benefit of covenants as to liability under them, so as to prevent an underlessee in general from maintaining an action of covenant against the original lessor (*a*); nor does it make any difference that the latter may have entered into covenants with the lessee and his assigns, for an underlessee is not an "assign" within their meaning (*b*). The underlessee may, however, be restrained from the commission of further breaches by injunction (*c*), and damages may at the same time be recovered against the sub-lessor if in default: *e.g.*, where the latter in breach of a covenant not to carry on trade or business, or permit it to be carried on, upon the demised premises, sub-let them to a person to whom he gave an express licence to carry on a particular business (*d*). But even if (in such a case) the sub-lessor expressly covenant for quiet enjoyment (*e*), the sub-lessee cannot avail himself of the third party procedure now provided by the Rules of the High Court (*f*), in order to obtain relief against him, for his claim is not one for "contribution or indemnity" within their meaning (*g*).

Actions on covenants.—Injunction.—The rule of law just mentioned (*h*), which required privity of estate between the parties in order to found an action upon a covenant, is unaffected by the fusion of law and equity under the Judicature Acts (*i*). It is, however, provided by statute (the rule being formerly different (*k*)), that in order to entitle a person to the benefit of a covenant respecting any tenements or hereditaments granted by an indenture of demise, it is not necessary that he should be named a party to the deed (*l*). Where premises, which had been devised to trustees

(*y*) *Holford v. Hutch*, 1 Dougl. 183. Nor is the effect of this rule in any way departed from where a receiver (who is an officer of the Court) is appointed in substitution for the underlessee: *Hand v. Blow*, [1901] 2 Ch. 721.

(*z*) *Derby (Lord) v. Taylor*, 1 East, 502.

(*a*) Per Joyce, J., in next-cited case.

(*b*) *South of England Dairies v. Baker*, [1906] 2 Ch. 631. Cf. *post*, p. 246, at note (*q*).

(*c*) See next head. He is also liable

to distress by the original lessor (see *post*, p. 492), and to ejectment (see *post* pp. 765 *et seq.*).

(*d*) *Tritton v. Bankart*, 56 L. T. 306.

(*e*) As to this covenant, see p. 297 *post*.

(*f*) R. S. C. 1883, O. 16, rr. 48—55.

(*g*) *Tritton v. Bankart*, *supra*.

(*h*) *Supra*, at note (*y*).

(*i*) See *Hall v. Ewin*, 37 Ch. Div. 74.

(*k*) *Southampton (Lord) v. Brown*, 6 B. & C. 718.

(*l*) 8 & 9 Vict. c. 106, s. 5.

on certain trusts, were demised by the tenant for life under the Settled Land Act by a lease containing the usual covenants to repair, it was held that, as the tenant for life was deemed under that Act to be in the position of a trustee for all parties entitled under the will (*m*), the covenant in question enured for the protection and benefit of the trust estate, that the trustees could consequently (as equitable owners of the money to be recovered) join in an action for dilapidations, and that the lessee was not entitled to rely upon a set-off which he alleged against the tenant for life only (*n*).

When a lease contains a number of covenants, and either party repudiates his obligation in respect of any one of them before the time for its performance, it seems that the other party cannot sue before that time arrives, unless such repudiation entitles him to put an end to the whole lease (*o*).

Actions on covenants are brought either to recover damages for a breach, or to obtain an injunction against its continuance. The question as to when an injunction may be obtained will be discussed under the several covenants of the lease (*p*). When an interlocutory injunction is sought for (*q*), it will only be granted on the usual undertaking as to damages, except, in the case of a Crown lease, where the Attorney-General is suing on behalf of the Crown (*r*). When the letting is expressed to be made only for a specified purpose, the application of the premises to any other purpose will, as a breach of the agreement, be restrained by injunction (*s*). Where the lease of a residential flat in a block of buildings let in flats to different tenants contained a covenant by the lessors to employ a resident porter to render certain specified services to the tenants, it was held that one of the latter, though entitled to damages, was not entitled to an injunction to restrain the continuance of the breach by the refusal of the lessors to appoint a person *bonâ fide* to discharge the duties of the post (*t*).

(*m*) *Ante*, p. 29.

(*n*) *Mitchell v. Armstrong*, 17 T. L. R. 495. *Sed quæ* as to the grounds of this decision, comparing the principle established by *Walters v. Northern Coal Co.*, 5 D. M. & G. 629, and other cases cited *ante*, pp. 71, 72. It is submitted that the real test of whether the trustees can sue is whether the legal estate is in them or in the tenant for life.

(*o*) *Johnstone v. Milling*, 16 Q. B. Div. 460.

(*p*) See *post*, pp. 228, 244, 245, 259, 267, 281, 288, 295, 297, 305.

(*q*) See, *e.g.*, pp. 259, 282, 289, *post*.

(*r*) *Att.-Gen. v. Albany Hotel Co.*, [1896] 2 Ch. 696.

(*s*) *Kehoe v. Marquess of Lansdowne*, [1893] A. C. 451. Cp. *Gedge v. Bartlett*, 17 T. L. R. 43, cited, *post*, p. 267.

(*t*) *Ryan v. Mutual Tontine, &c., Association*, [1893] 1 Ch. 116; *Alexander v. Mansions Proprietary*, 16 T. L. R. 431.

But where in the lease of rooms in a flat, "together with all rights, easements, and appurtenances whatsoever to the said rooms belonging or appertaining," the tenant agreed to pay the gas rate (so that the parties obviously bargained on the footing that gas should come in to the demised premises), it was held, on a dispute arising between them as to the price of the gas supplied to the flat, that though the landlords might sue the tenant for what had been paid in respect of the gas on his behalf, the latter was entitled to an injunction restraining them from interfering with the supply of gas by disconnecting a pipe through which at the time of the demise it was conveyed to the premises (*u*).

If the act complained of by the party seeking the remedy of an injunction is not an actual violation of his right, but a threatened or intended act which, if carried into effect, will be a violation of the right, he must be prepared to show that this result, in the view of ordinary men using ordinary sense, would inevitably follow (*v*).

In the case of a negative or restrictive covenant (*e.g.*, not to turn premises to a particular use) it would seem that the Court, upon an application for an injunction, has not (speaking generally) any discretion to exercise; for an injunction in such case does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties (*w*). And the same rule will apply to a mandatory injunction where a breach of the covenant is deliberately committed after notice of objection, and no laches is attributable to the covenantee (*x*).

Implied covenants (*y*).—An express covenant always restrains and overrides an implied one to the same effect (*z*). But in the absence of an express covenant in a lease, it seems clear (*a*) that the implication of a covenant in law may arise; and it has been expressly decided that it may arise, not necessarily from the use

(*u*) *Hersey v. White*, 9 T. L. R. 335.

(*v*) *Pattison v. Gifford*, L. R. 18 Eq. 259, per Jessel, M. R.

(*w*) *Doherty v. Allman*, 3 App. Ca. 709, per Lord Cairns, L. C. This dictum is not of course to be taken in its absolute sense as implying that equitable considerations, such as acquiescence, are not to be regarded at all: see pp. 263—267, *post*.

(*x*) *Bickmore v. Dimmer*, [1903] 1 Ch. 158, per Cozens-Hardy, L. J.

(*y*) For the sake of convenience im-

plied covenants and agreements are here treated together, whether implied in leases under seal or not.

(*z*) *Line v. Stephenson*, 5 Bing. N. C. 183, following *Nokes's case*, 4 Co. 80 b; *Merrill v. Frame*, 4 Taunt. 329; *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836. For an instance where the covenants are not to the same effect, see *infra*, p. 150.

(*a*) See *Baynes v. Lloyd*, [1895] 2 Q. B. 610, at p. 615, where the older authorities are reviewed.

of an expression (like the word "demise") in the instrument of letting having a known legal operation, but (as in the case of the covenant for quiet enjoyment) from the mere relation of landlord and tenant (*b*). But it has been provided by statute that the word "give" or the word "grant," in a *deed* executed after the 1st of October, 1845, shall not imply any covenant in law in respect of any premises, except so far as those words may imply a covenant by force of any Act of Parliament (*c*). Moreover, a covenant in law does not extend beyond the interest possessed by the lessor himself in the premises, whether it be implied in a demise by deed (*d*) or in a demise by parol (*e*); hence, for example, where a demise for years is made at common law by a tenant for life, who dies during the term so that the estate is defeated, his executors are not liable upon such a covenant (*f*).

I. Implied covenants of the lessor.

(1.) *Covenant for quiet enjoyment*.—Subject to what has just been stated as to the use of the word "demise," this covenant may now be said to be implied in law, both in lettings by deed (*g*) and in lettings not by deed (*h*). But this implication may be displaced by an express stipulation in the letting on the part of the lessor that it should be subject to the conditions of his own holding (*i*). Its operation, moreover, is, as just stated, limited to the duration of the lessor's own interest: and apparently this holds whether the tenant had notice of the limited nature of the landlord's interest (*k*) or not (*l*). Hence a yearly tenant, for instance, has been held not to be entitled to sue his landlord, who proved to have only a term of years in the premises, upon being

(*b*) *Budd-Scott v. Daniell*, [1902] 2 K. B. 351, disapproving *dicta* of C. A. to the contrary in last-cited case. Cp. *Hancock v. Caffyn*, 8 Bing. 358, per Tindal, C. J. In *Jones v. Lavington*, [1903] 1 K. B. 253, cited *infra*, however, the C. A., without laying down a definite principle or expressly overruling any of the earlier authorities, seem again to show a decided leaning in favour of the opinion embodied in the *dicta* just referred to.

(*c*) 8 & 9 Vict. c. 106, s. 4. The words in question are obviously the operative words of conveyances other than leases.

(*d*) *Baynes v. Lloyd*, *supra*; *Bragg v. Wiseman*, 1 Brown. & G. 22; *Adams v. Gibney*, 6 Bing. 656.

(*e*) *Penfold v. Abbott*, 32 L. J. Q. B. 67; *Messent v. Reynolds*, 3 C. B. 194.

(*f*) *Adams v. Gibney*, *supra*. *Scous*, upon an express covenant to the like effect: *Williams v. Burrell*, 1 C. B. 402.

(*g*) *Adams v. Gibney*, *supra*.

(*h*) *Budd-Scott v. Daniell*, [1902] 2 K. B. 351, following *Bandy v. Courtwright*, 8 Exch. 913; *Hall v. City of London Brewery Co.*, 2 B. & S. 737; *Robinson v. Kilvert*, 41 Ch. Div. 88, per Lindley, L. J.

(*i*) *Hoare v. Chambers*, 11 T. L. R. 185.

(*k*) *Penfold v. Abbott*, 32 L. J. Q. B. 67; *Adams v. Gibney*, 6 Bing. at p. 667; *Baynes v. Lloyd*, *supra*.

(*l*) *Schwartz v. Lockat*, 61 L. T. 719.

evicted by the head landlord when that term came to an end (*m*). And an agreement where relief can be had by specific performance now stands, it is thought, upon the same footing (*n*), though before the Judicature Acts no covenant for quiet enjoyment was to be implied from a mere agreement to grant a future lease (*o*). In an agreement, too, which operates as a present demise (*p*), a promise will be implied on the part of the lessor to give possession (*q*); but not where the agreement cannot have that effect, as where it is to grant a lease for more than three years (*r*) by an instrument not by deed (*s*), though the agreement itself may be specifically enforced or damages recovered for its breach (*t*).

This covenant, like the express covenant to the same effect (*u*), applies only to the lawful and not the wrongful acts of strangers (*v*); but whether, like that covenant, it extends only to the acts of persons claiming under the lessor appears to be still doubtful (*x*). Such doubt, however, may be said only to exist where the word "demise" has been employed in the instrument of letting; for that by the use of the word "let," in an instrument of immediate letting, the covenant (even if it can be implied at all) (*y*) does not extend beyond the acts of such persons has now been expressly decided by the Court of Appeal (*z*). It has been implied in favour of a party who has a mere *interesse termini* (*a*) and not possession (*b*), though for a reason which is given hereafter (*c*) it has also been held that such implication ought not to be made (*d*).

(2.) *Covenant for title*.—This covenant (*e*), though not implied in a demise by parol (*f*), has often been held to be implied in law

(*m*) *Schwartz v. Locket*, *supra*.

(*n*) Cf. *ante*, pp. 12—15.

(*o*) *Brashier v. Jackson*, 6 M. & W. 549, per Alderson, B.

(*p*) *Ante*, p. 74.

(*q*) *Coe v. Clay*, 5 Bing. 440; *Jinks v. Edwards*, 11 Exch. 775.

(*r*) See 8 & 9 Vict. c. 106, s. 3; *ante*, p. 10.

(*s*) *Drury v. Macnamara*, 5 E. & B. 612.

(*t*) *Id.*, per Coleridge, J.

(*u*) *Post*, p. 297.

(*v*) See *Granger v. Collins*, 6 M. & W. 458; *Wallis v. Hands*, [1893] 2 Ch. 75, per Chitty, J., at p. 83.

(*x*) For the affirmative may be cited *Andrew's case*, 2 Leon. 104, and *Shep.*

Touch. 165; and for the negative *Holder v. Taylor*, Hob. 12.

(*y*) *Supra*, p. 141.

(*z*) *Jones v. Lavington*, [1903] 1 K. B. 253, following the opinion held to have been previously expressed in *Baynes v. Lloyd*, *supra*. In *Hancock v. Caffyn*, 8 Bing. 358, and in *Bandy v. Cartwright*, 8 Exch. 913 (where, however, the point was not argued), the contrary view seems to have prevailed.

(*a*) *Ante*, p. 20.

(*b*) *Holder v. Taylor*, *supra*.

(*c*) *Post*, p. 298.

(*d*) *Wallis v. Hands*, *supra*.

(*e*) As to the distinction between the covenant for title and that for quiet enjoyment, see p. 298, *post*.

(*f*) *Bandy v. Cartwright*, *supra*.

in the case of a demise by deed (*g*); but it seems probable that such implication, if it properly arises at all, only arises from the use of the word "demise" in the instrument (*h*). And as its operation ceases with the determination of the lessor's interest (*i*), its value to the lessee (except where the lessor is unable to give possession at all) would appear to be somewhat problematical. Nor can a lessee recover damages for the breach arising from an infirmity in his lessor's title of which he was cognisant (*k*). In an agreement, too, to grant a lease an undertaking will be implied at law on the part of the lessor, that he has a good title to let (*l*) at the time the demise is to take effect (*m*), though not that he has power to let without restriction as to the purpose for which the premises are to be used (*n*). But this implication (as in the case of the covenant for quiet enjoyment) is not to be made when the lessor stipulates that the letting is subject to the terms under which he himself holds from his own landlord (*o*).

On the other hand, a person taking a lease of premises has constructive notice of his lessor's title (*p*); hence, where there was an agreement by a termor to grant an underlease which was subsequently executed and purported to enure for a term longer than the lessor, as it proved, had power to grant, it was held that the principle of *caveat emptor* applied, and that the underlessee not having investigated the title had no claim to compensation (in the absence of an express stipulation for its payment (*q*)) for the loss he had incurred (*r*).

(3.) *Covenant for fitness*.—It may be premised that the general rule in leases and agreements is that no covenant will be implied on

(*g*) *Holder v. Taylor*, *supra*; *Burnett v. Lynch*, 5 B. & C. 589, per Little-
dale, J.; *Lane v. Stephenson*, 5 Bing. N. C. 183; *Mostyn v. West Mostyn Coal Co.*, 1 C. P. D. 145. The provisions of the Conv. Act, by which covenants for title are implied in conveyances generally, do not apply to leases (44 & 45 Vict. c. 41, s. 7 (5)).

(*h*) *Baynes v. Lloyd*, [1895] 2 Q. B. 610, where the C. A., relying on *Shep. Touch.* 165, seem to incline to the view that a covenant for title (unlike one for quiet enjoyment) is not to be implied in any case.

(*i*) *Baynes v. Lloyd*, *supra*. Cf. *supra*, p. 141.

(*k*) *Gas Light, &c., Co. v. Tourne*, 85 Ch. D. 519.

(*l*) *Stranks v. St. John*, L. R. 2 C. P.

376, explained in *Baynes v. Lloyd*, [1895] 1 Q. B. 820; 2 Q. B. 610. As to the damages recoverable, see *post*, p. 388.

(*m*) *De Medina v. Norman*, 9 M. & W. 820.

(*n*) *Jackson v. Cobbin*, 8 M. & W. 790, per Parke, B.

(*o*) *Hoare v. Chambers*, 11 T. L. R. 185.

(*p*) *Patman v. Harland*, 17 Ch. D. 353, per Jessel, M. B.; *Magridge v. Clapp*, [1892] 3 Ch. 382. See *post*, p. 426.

(*q*) *Palmer v. Johnson*, 13 Q. B. Div. 351.

(*r*) *Clayton v. Leech*, 41 Ch. Div. 103; *Besley v. Besley*, 9 Ch. D. 103. As to covenants in underleases generally, see p. 137, *supra*.

the part of the landlord to do repairs of any kind (*s*). (Nor can one of two tenants in common to whom the premises have been demised by the other, and who expends money on ordinary repairs, recover from him his share of the expense (*t*).) *A fortiori* there is no implied obligation upon him to rebuild the premises in case of fire (*u*), even if he have expressly covenanted for quiet enjoyment (*x*), or even if the tenant's covenant to repair contain an express exception in case of fire (*y*). Nor does he undertake that the premises will receive proper support (*z*), or endure during the term (*a*), or that they are fit for occupation (*b*), or for the purpose for which they are intended to be used (*c*). (Where, however, the demised premises are, or become, subject to a structural defect, *e.g.*, of drains, which may give rise to a nuisance or be dangerous or injurious to health, the tenant may, if the steps directed by the Public Health Act (*d*) be taken (*e*), throw the liability for its repair or removal—in the absence of any agreement relating to the matter

(*a*) *Gott v. Gandy*, 2 E. & B. 845; notes to *Pomfret v. Ricroft*, 1 Wms. Saund. 557 (ed. 1871). In *Broggi v. Robins*, 15 T. L. R. 224, it was said that evidence of repairs to the premises having always been done when necessary by the lessor was sufficient to support an implied agreement by him to repair, as being equivalent to evidence that in the usual course of things landlords did repairs in tenancies of the kind—a humble one—there in question. This, however, seems scarcely correct. At the most such evidence can only be evidence from which an actual undertaking to do the repairs may be inferred, and (it is thought) cannot of itself amount even to that. See *Nelson v. Liverpool Brewery Co.*, 2 C. P. D. 311; *Malone v. Laskey*, [1907] 2 K. B. 141.

(*b*) *Leigh v. Dickeson*, 15 Q. B. Div. 60.

(*u*) *Bayne v. Walker*, 3 Dow, 233.

(*z*) *Brown v. Quilter*, Amb. 619.

(*y*) *Weigall v. Waters*, 6 T. R. 488. See p. 222, *post*.

(*z*) *Colebeck v. Girdlers' Co.*, 1 Q. B. D. 224. This principle, however, must not be understood to apply in its integrity to flats: see per Lord Selborne, L. C., in *Dalton v. Angus*, 6 App. Ca. 740, referring to *dictum* of Lord Cranworth, L. C., in *Caledonian Ry. Co. v. Sprot*, 2 Macq. at p. 450, *ad fin.*

(*a*) See *Arden v. Pullen*, 10 M. & W. at p. 326, per Lord Abinger, C. B. As to the tenant's liability for rent where he loses the use of the premises, see *post*, pp. 170, 171.

(*b*) *Hart v. Windsor*, 12 M. & W. 68; *Chappell v. Gregory*, 34 Beav. 250; *Keates v. Cadogan*, 10 C. B. 591; *Bartram v. Aldous*, 2 T. L. R. 237. See at note (*n*), p. 148, *infra*. It may be mentioned that it is enacted by statute (38 & 39 Vict. c. 55, s. 128) that any person who knowingly lets for hire any house, room, or part of a house, in which any person has been suffering from any dangerous infectious disorder, without having it (and all articles therein liable to retain infection) disinfected to the satisfaction of a legally qualified medical practitioner, as testified by a certificate signed by him, shall be liable to a penalty. How far this may give a cause of action to a person injured by a breach of this statutory duty seems a difficult question: see Maxwell on Statutes, pp. 612–622 (4th ed.).

(*c*) *Sutton v. Temple*, 12 M. & W. 52; *Erskine v. Adeane*, L. R. 8 Ch. 756; *Manchester Bonded, &c., Co. v. Carr*, 5 C. P. D. 507. Cp. *B'um v. Ansley*, 16 T. L. R. 249, cited *ante*, p. 20.

(*d*) 38 & 39 Vict. c. 55, ss. 94 *et seq.*; and, as to the metropolis, 54 & 55 Vict. c. 76, ss. 4 *et seq.* Under the former Act the nuisance must arise from the want or defective construction of a “structural convenience”: under the latter it may arise from any want or defect of a structural character.

(*e*) For an instance where such steps were not taken, see *Thompson and Norris Manufacturing Co. v. Hawes*, 73 L. T. 369.

between the parties (*f*)—upon the landlord (*g*).) So the tenant of a floor or flat in a building, with water “laid on” for the benefit of himself and the other tenants in the building, has no remedy against the landlord, in the absence of proof of negligence, for damage to his premises sustained through its escape (*h*); nor is such negligence established by proof of negligence in an independent contractor (of competent character) employed by the landlord (*i*).

It follows from the above principle that neither the tenant nor any person (*e.g.*, a sub-tenant) claiming under him (*j*) can recover against the landlord for personal injuries sustained through want of repair to the premises (*k*), and *à fortiori* when such want of repair exists, not in the demised premises themselves, but in an adjoining place to which the tenant has access merely by virtue of a licence from the landlord given to him for his own convenience (*l*).

It obviously does not conflict with this statement of the law, that where premises are let in flats to which the only access is by a staircase the possession and control of which *remain in the landlord*, the latter is under an obligation—to his own tenants as well as to strangers (*m*)—to keep such staircase in reasonably safe repair (*n*). So where the roof of a building so let remained in his possession and control, and a rain-water gutter in it became stopped up, it was held that there was a duty upon him to take care that it was not in such a condition as to cause injury to his tenants, and that he was liable for damage to their goods from the fall of rain-water which happened through continued neglect to examine the roof, and to remove the stoppage for an unreasonable period after receiving notice of its occurrence (*o*).

It is, moreover, a principle of general application that a grantor may not derogate from his grant (*p*), regard always being had to

(*f*) 38 & 39 Vict. c. 55, s. 104; 54 & 55 Vict. c. 76, ss. 11, 121. The tenant, as usual in such cases (*cf. post*, p. 199), may be called on to pay in the first instance, and may deduct the payment from his rent.

(*g*) See *Gebhardt v. Saunders*, [1892] 2 Q. B. 452.

(*h*) *Carstairs v. Taylor*, L. R. 6 Ex. 217; *Anderson v. Oppenheimer*, 5 Q. B. Div. 602.

(*i*) *Blake v. Woolf*, [1898] 2 Q. B. 426.

(*j*) The same thing, as will hereafter be pointed out, applies to a stranger: see per Collins, M. R., *Cavalier v. Pope*, [1905] 2 K. B. 757, cited *post*, p. 238.

F.

(*k*) *Norris v. Catmur*, O. & E. 576, Huddleston, B. As to liability when the lessor undertakes to repair, see *post*, p. 237.

(*l*) *Ivay v. Hedges*, 9 Q. B. D. 80. It makes no difference in such a case that the want of repair was known to the landlord: *id.*

(*m*) *Hargroves v. Hartopp*, [1905] 1 K. B. 472, per Lord Alverstone, C. J.

(*n*) *Miller v. Hancock*, [1893] 2 Q. B. 177; cited *post*, p. 239.

(*o*) *Hargroves v. Hartopp*, *supra*.

(*p*) See *ante*, p. 91; and *cf. Lyttelton Times Co. v. Warners*, 23 T. L. R. 751.

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the whole circumstances under which the grant was made (*q*). Hence, though no warranty of fitness of the demised premises will be implied as against the landlord, yet, if he commit a wrongful act the result of which, by reason of the condition in which he let them, is to cause damage to the premises, he will not, in an action against him by the tenant, be permitted to set up in defence that they were let in a defective state, and that but for that circumstance no injury would have been sustained; nor does it make any difference that their defectiveness at the time of the demise was known to the tenant (*r*). Hence, also, if he lets a portion of his property for the purpose of a particular trade or business to be carried on by the lessee, he becomes bound to abstain from any act on the adjoining portion which would render the premises unfit for carrying on such business in the way in which it is carried on in the ordinary course (*s*), though this obligation does not extend to special branches of the business, of the nature of which he is ignorant, and which call for extraordinary protection (*t*).

The lessor, too, may of course always incur liability by reason of an express representation that the premises are fit for a given purpose; but such representation, in order to give the lessee a right of action for damages (*u*), must be not only untrue but fraudulent (*x*)—i.e., false to the knowledge of the lessor or at least made without belief in its truth (*y*),—unless it amount to a warranty (*z*) or form a condition of the contract (*a*). The question whether a statement (e.g., as to the condition of drains) upon the granting or taking of a lease amounts to a warranty or is mere representation is the same as upon the sale of a chattel: and a decisive test is whether the lessor assumes to assert a fact of which the intending tenant is ignorant, or merely states an opinion or judgment upon a matter

(*q*) *Birmingham, &c., Banking Co. v. Ross*, 38 Ch. Div. 295, referred to *ante*, p. 85.

(*r*) *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836.

(*s*) *Aldin v. Latimer Clark & Co.*, [1894] 2 Ch. 437; *Betts v. Pickfords*, [1906] 2 Ch. 87.

(*t*) *Robinson v. Kilvert*, 41 Ch. Div. 88.

(*u*) As to the right of rescission, see *post*, p. 341.

(*x*) *Saunders v. Pawley*, 2 T. L. R. 590; *Butler v. Goundry*, 4 T. L. R. 711; *Green v. Symons*, 13 T. L. R. 301; *Kenward v. Ashman*, *infra*; *Longman v. Blount*, *infra*; *Burtal v. Bianchi*, 65 L. T. 678. And even in the case of fraud the tenant's cause of action is not

of a continuing character, so as to permit him, after having once recovered against the landlord in respect of it, to sue him again for any damage he may subsequently sustain: *Clarke v. Yorke*, 52 L. J. Ch. 32.

(*y*) See *Derry v. Peek*, 14 App. Ca. 337.

(*z*) *Best v. Edwards*, 60 J. P. 9. *Longman v. Blount*, 12 T. L. R. 520, where Wright, J., seems to have thought that a written warranty, if given before the execution of a lease itself silent on the subject, could not be relied upon by the lessee, may probably now be regarded as incorrect: see *De Lassalle v. Guildford*, *infra*.

(*a*) *Bunn v. Harrison*, 3 T. L. R. 146.

of which he has no special knowledge and on which the tenant may be expected also to have an opinion and to exercise his judgment (b). In the former case, provided the statement was intended to be the basis of the contractual relation between the parties, it will amount to a warranty (b). And although the question of warranty or no warranty is no doubt one of fact, it would seem, having regard to the above principle, that it will now in most cases be a matter of some difficulty to contend that a statement, made by a landlord upon a proposed letting, as to the sanitary condition of the premises, is a mere representation, and as such not actionable without proof of fraud. Thus where upon the granting of a lease a verbal warranty was given by the lessor as to the condition of the drains, the lease itself being silent on the subject (though it contained covenants on the part of both lessor and lessee to execute certain repairs *during the tenancy*, and these would include the drains), it was held that such warranty was collateral to the lease (c), and that upon its breach an action was consequently maintainable (d). The effect of a representation as to an existing condition of fitness is different from that of a promise or contract to render the premises suitable for a given purpose, upon which an action may always be maintained by the lessee, unless the subject-matter of the promise is so intimately connected with that of the contract of tenancy that it ought to have formed part of the lease when it came to be executed (e), and consequently cannot be regarded as collateral to the lease (f).

To the main principle there are, moreover, two important exceptions, in the case of lettings (a) of furnished premises, (b) of premises for the working classes:—

(a) In the case of furnished premises.—In the letting of furnished houses and apartments an undertaking is implied on the part of the lessor that they are reasonably fit for the purposes of habitation; and where, for instance, owing to the presence of noxious insects (g), or defects of drains (h), or infectious or

(b) *De Lassalle v. Guildford*, [1901] 2 K. B. 215.

(c) For an instance of a warranty not collateral to the lease, but referring to the subject-matter of the contract of tenancy itself, see *Jones v. Lavington*, [1903] 1 K. B. 253, cited *supra*, p. 142.

(d) *De Lassalle v. Guildford*, *supra*. The tenant in this case had refused to complete unless he received an assur-

ance from the landlord that the drains were in order.

(e) *Kennard v. Ashman*, 10 T. L. R. 213, 447.

(f) See *post*, pp. 390–1.

(g) *Smith v. Marrable*, 11 M. & W. 5; *Harrison v. Malet*, 3 T. L. R. 58.

(h) *Wilson v. Finch-Hatton*, 2 Ex. D. 336; *Charsley v. Jones*, 53 J. P. 280; *Harrison v. Malet*, *supra*.

contagious illness (*i*), this is not the case, the lessee is justified in repudiating the tenancy—for the undertaking amounts to a condition and not merely to a warranty (*k*)—and if he has incurred loss he will be entitled to recover damages (*l*). The exact limits of the rule are not perhaps yet finally settled. It has been said that it extends only to cases where the occupation is of a temporary character (*m*); and, on the other hand, though the rule has been held to be strictly confined to furnished houses and apartments (*n*), a question has been raised as to whether it may not apply even to an unfurnished house if taken for immediate occupation (*o*). The undertaking extends to every part of the premises (*p*), but it applies only to their condition at the commencement of the tenancy (*q*),—nor does it make any difference that the landlord resides on the premises and provides the tenant with attendance (*r*); and if it be not fulfilled by the lessor it is immaterial that the lessee has previously intimated his intention to repudiate the agreement (*s*). Nor is it any answer on the part of the landlord to plead that he honestly believed the premises to be fit for habitation (*t*). How far a third party damnified by a breach of the undertaking may claim damages against the landlord does not appear as yet to have been considered: but on the grounds which will be explained hereafter (*u*), it is submitted that he can only do so where he is able to show that by reason of particular circumstances the landlord was under some duty towards him.

It may be added that there is an implied obligation on the part of the landlord of lodgings or furnished apartments to take due and proper care of the goods of his tenant or boarder (*x*), and

(*i*) *Bird v. Greville*, C. & E. 317, Field, J.

(*k*) *Wilson v. Finch-Hatton*, *supra*.

(*l*) *Charsley v. Jones*, *supra*.

(*m*) *Chester v. Powell*, 52 L. T. 722, per Bacon, V.-C. The letting here was of a partly-furnished house with some acres of ground for a term of five years. (Rule held not to apply.)

(*n*) *Sutton v. Temple*, 12 M. & W. 52, and *Hart v. Windsor*, *id.*, 68: explaining *Smith v. Marrable*, 11 M. & W. 5.

(*o*) *Bunn v. Harrison*, 3 T. L. R. 146. The question was expressly left open by the Court of Appeal, but until answered affirmatively by that Court, it admits of no doubt that the law on the subject is as stated in the text. In point of principle, the distinction, perhaps, is not easy to appreciate.

(*p*) *Campbell v. Wenlock*, 4 F. & F. 716. The undertaking here was express, but the same principle applies: see per Cockburn, C. J.

(*q*) *Macllean v. Currie*, C. & E. 361, Stephen, J.; *Chester v. Powell*, *supra*; *Dawson v. Clementson*, 1 T. L. R. 295. It does not, of course, necessarily follow that the defects must have then shown themselves: as, for instance, where a house seriously defective from damp is habitable in hot or dry weather.

(*r*) *Sarson v. Roberts*, [1895] 2 Q. B. 395.

(*s*) *Bird v. Greville*, *supra*.

(*t*) *Charsley v. Jones*, 53 J. P. 280.

(*u*) See *post*, p. 238.

(*x*) See *Scarborough v. Cosgrove*, [1905] 2 K. B. 805, C. A. (disapproving *Holder v. Soulby*, 8 C. B. N. S. 254); *Dansey v. Richardson*, 3 E. & B. 144.

a fortiori he will be liable for their loss if such loss be caused by his gross negligence or misconduct (*y*).

(*b*) In the case of lettings for the working classes.—A similar obligation as to fitness is now imposed by statute (*z*) on the landlords of unfurnished as well as furnished tenements (whether a house or part of a house) let (*a*) for habitation by persons of the working classes and others (*b*) at rents not exceeding a certain specified amount (*c*), viz., 20*l.* in the metropolis (*d*), 13*l.* in Liverpool, 10*l.* in Manchester or Birmingham, 8*l.* elsewhere in England, and (*e*) 4*l.* in Scotland or Ireland.

This provision gives the tenant a right of action against his landlord for injuries sustained by him in consequence of the premises not being at the commencement of the tenancy reasonably fit for human habitation, *e.g.*, from their defective state of repair (*f*); and although, having regard to its terms, there seems no reason why the landlord may not get rid of his liability under it by express agreement to that effect, an amending enactment now prevents that result by directing that, as regards future contracts of letting (*g*), the above provision shall take effect notwithstanding any agreement to the contrary, and that any such agreement (*g*) shall be void (*h*). As regards the right of a third party to take advantage of the statute, it is thought that, following the rule which is explained hereafter, such right (just as in the last case) will only exist where he is able to show that, owing to special circumstances, a duty towards him was imposed upon the landlord (*i*).

II. *Implied covenants of the lessee.*

A covenant or agreement is implied on the part of the lessee to use the premises in a tenant-like manner. This obligation falls under two heads, which it is convenient to treat of separately (*k*):—

(1) Where the demised premises consist of houses or buildings, when the obligation resolves itself into one to do repairs of a certain

(*y*) *Clench v. d'Arenberg*, C. & E. 42, Cave, J. Compare *Espir v. Todd*, *id.*, 154, Cave, J.

(*z*) 53 & 54 Vict. c. 70, s. 75.

(*a*) By any contract made after 14th August, 1885.

(*b*) See the definition at the end of the section.

(*c*) 32 & 33 Vict. c. 41, s. 3.

(*d*) By sect. 20 of last-cited Act, the limits are those of the Met. Man. Act, 1855: see 18 & 19 Vict. c. 120, s. 250.

(*e*) 53 & 54 Vict. c. 70, s. 75.

(*f*) *Walker v. Hobbs*, 23 Q. B. D. 458.

(*g*) Made after 14th August, 1903.

(*h*) 3 Edw. 7, c. 39, s. 12.

(*i*) See *post*, p. 238. In the last-cited case, where the tenancy is described as having been in a husband and wife, and injury was sustained by the wife, an action by them jointly was held maintainable. If the report is correct, the above point did not, of course, arise.

(*k*) As to the express covenant not to commit waste, see *post*, p. 282.

kind (*l*). (2) Where they consist of agricultural property, when the obligation is to cultivate in a husbandlike manner, according to the custom of the country (*m*).

(1) The amount or character of the repairs necessary to fulfil this implied obligation, in the case of leases or agreements for a term of years, has apparently never been defined with precision. This is for the obvious reason that such instruments almost invariably contain an express covenant—which displaces the implied one (*n*)—by the tenant to the same effect (*o*); though the implied covenant will not be displaced by one not to the same effect, *e.g.*, by one merely to leave the premises in a certain state of repair (*p*). (It may be mentioned here, however, that a tenant for years, whether under a covenant to repair or not, will be liable for “permissive waste” (*q*); but he is not liable, in the absence of an express agreement to the contrary, or of an undertaking to repair (*r*), for damage by accidental fire, *i.e.*, arising neither by design nor by negligence (*s*), to the demised premises (*t*.) But the question has occasionally arisen for consideration in the case of tenancies from year to year, and the obligation has there been variously described as being one to use the premises in a husbandlike manner (*u*), to keep them wind and water tight (*x*), and to make fair and tenantable repairs, so as to prevent their decay (*y*); but, on the other hand, not to be an obligation to do “general” (*z*), or “substantial” (*a*), repairs, or to make good mere wear and tear (*b*), or to sustain and uphold the premises (*c*), or to keep them in good tenantable condition (*d*).

(2) Where the demised premises consist of farms or other agricultural property, an obligation will be implied on the part of

(*l*) See, *e.g.*, *White v. Nicholson*, 4 M. & Gr. 95.

(*m*) *Infra*, pp. 151—153.

(*n*) *Standen v. Christmas*, 10 Q. B. 135. See p. 140, *supra*.

(*o*) See *post*, p. 216.

(*p*) *White v. Nicholson*, *supra*.

(*q*) See *post*, p. 232.

(*r*) *Post*, p. 221.

(*s*) *Hicks v. Downing*, 1 Ld. Ray. 99; *Filliter v. Phippard*, 11 Q. B. 347.

(*t*) 14 Geo. 3, c. 78, s. 86,—a provision which, though contained in a statute applying for the most part only to the metropolis, is itself of general application: *Filliter v. Phippard*, *supra*. See, however, as to this statute, p. 241, *post*.

(*u*) *Horsefall v. Mather*, Holt, N. P. C. 7.

(*x*) *Auworth v. Johnson*, 5 C. & P. 239; *Leach v. Thomas*, 7 C. & P. 327.

(*y*) *Ferguson v. Anon.*, 2 Esp. 590. The word “tenantable” seems to be used in this connection in a different and more limited sense than the one which it has in the covenant to keep premises “in tenantable repair”: see *post*, p. 226.

(*z*) *Horsefall v. Mather*, *supra*.

(*a*) *Leach v. Thomas*, *supra*.

(*b*) *Torriano v. Young*, 6 C. & P. 8.

(*c*) *Auworth v. Johnson*, *supra*.

(*d*) *Horsefall v. Mather*, *supra*.

the tenant (*e*) to cultivate them in a husbandlike manner, according to the custom of the country (*f*); though after the end of the year 1908 (*g*) he will be at liberty, subject to what is stated hereafter (*h*), to disregard such custom (*i*). A residence, however, with a garden and meadow attached does not constitute agricultural property within the meaning of this rule, though, of course, as in every other case, the premises must be occupied in a tenant-like manner (*k*). Such custom, like other customs, must be certain, reasonable, uninterrupted, and, strictly speaking, must date from time immemorial (*l*); but a usage not fulfilling the last-named requirement (and therefore not strictly a legal custom (*m*)) will be sufficient to govern a tenancy if it be merely shown to have subsisted for a reasonable time (*n*). The "custom of the country," with reference to good husbandry, must be determined by regard to the approved habits of husbandry under conditions similar to those of the demised premises in the neighbourhood where those premises lie (*o*); and its nature is to be collected, not from what witnesses say they think the custom is, but from what is proved to have been publicly done throughout the district (*p*). But though the custom must be certain, it need not be absolutely uniform. Thus, an undertaking to farm in a husbandlike manner according to the custom of the country was held to be broken by tilling half a farm, when it was shown that no other farmers in the neighbourhood tilled more than a third, though within that limit some tilled a greater and others a smaller proportion of their holdings (*q*). A custom, so long as it prevails in a particular district, need not be general in order to attach to the terms of a tenancy (*r*); but a custom which prevails only between the owner and tenants of a particular estate, however extensive, is not a "custom of the country" which binds a

(*e*) As to the express covenant for cultivation, see *post*, p. 289. Some of the authorities cited under this head deal with customs regulating, not the mode of cultivation, but the determination of the tenancy; the same principles, however, apply. See *post*, p. 719.

(*f*) *Pondley v. Walker*, 5 T. R. 373; *Onslow v. Anon.*, 16 Ves. 173.

(*g*) Sect. 9 of next-cited Act.

(*h*) *Post*, p. 294.

(*i*) 6 Edw. 7, c. 56, s. 3 (1).

(*k*) *Johnstone v. Symons*, 11 J. P. 618.

(*l*) *Tyson v. Smith*, 9 A. & E. 406, per Tindal, C. J. The question of reasonableness is one for the Court: *id.* See

also *Mercer v. Denne*, [1904] 2 Ch. 534; [1905] 2 Ch. 538.

(*m*) See the remarks of Jessel, M. R., in *Hammerton v. Honey*, 24 W. R. 603.

(*n*) *Tucker v. Linger*, 21 Ch. Div. 18, per Jessel, M. R.; *affd.*, 8 App. Ca. 508. See, too, the question discussed in *Dashwood v. Magniac*, [1891] 3 Ch. 306.

(*o*) *Legh v. Hewitt*, 4 East, 154, per Lord Ellenborough, C. J.

(*p*) *Tucker v. Linger*, *supra*, per Jessel, M. R.

(*q*) *Legh v. Hewitt*, *supra*.

(*r*) *Senior v. Armytage*, Holt, N. P. C. 197, per Thompson, C. B.; *Dalby v. Hirst*, 1 B. & B. at p. 228, per Richards, C. B.

person who becomes tenant on the estate without notice of its existence (*s*).

The custom attaches irrespective of the mode in which the tenancy is created, whether verbally, or by lease in writing (*t*), or even by deed (*u*); and it applies to tenancies, not only for years, but from year to year, whether created by express terms (*x*), or implied from holding over and payment of rent (*y*). But it may be excluded by express agreement (*z*), and it will be superseded by any stipulations in the contract of demise which are inconsistent with it (*a*); the burden, however, of showing such inconsistency being on those who assert it (*b*). And the reason of the rule being that the parties are always presumed to contract with reference to the custom (*c*), it follows that where there is a stipulation (*e.g.*, as to mode of cultivation) in the contract applying directly to the same subject-matter as the custom, the latter is impliedly excluded (*d*).

Apart from local custom, there appears to be no obligation at common law on the tenant to consume hay and straw on the premises (*e*), or to have a certain portion of land every year in a certain tillage (*f*). And after the end of the year 1908 (*g*) the tenant, as will be seen hereafter (*h*), and subject to what is there said, is expressly rendered free to practise any system of cropping of the arable land on his holding, and to dispose of the produce of his holding: and this notwithstanding any custom of the country or the provisions of any contract of tenancy or agreement (*i*).

The breach of an obligation as to cultivation (if of a negative character) founded on custom, like that of an obligation founded on express covenant (*k*), will be restrained by injunction (*l*).

As part of the tenant's implied obligation to use the premises in

(*s*) *Womersley v. Dally*, 26 L. J. Ex. 219.

(*t*) *Wilkins v. Wood*, 17 L. J. Q. B. 319.

(*u*) *Wigglesworth v. Dallison*, *infra*.

(*x*) *Onslow v. Anon.*, 16 Ves. 173.

(*y*) *Post*, p. 396.

(*z*) *Senior v. Armytage*, *supra*, per Thompson, C. B.

(*a*) *Wigglesworth v. Dallison*, 1 Sm. L. C. 545, and notes: *Tucker v. Linger*, 8 App. Ca. 508.

(*b*) *Senior v. Armytage*, *ubi sup.*

(*c*) *Hutton v. Warren*, 1 M. & W. 466, per Parke, B.

(*d*) *Greenslade v. Tapscott*, 1 C. M. & R. 55. See this matter discussed further, *post*, pp. 718–721.

(*e*) *Gough v. Howard*, Peake, Add. Ca. 197. (With regard to manure it is said to be otherwise: *id.*) But in the next-cited case there is a *dictum* attributed to Buller, J. (on whose authority both cases appear to have been decided), that in the absence of agreement to the contrary a tenant is bound to cultivate his farm in a husbandlike manner, and “to consume the *produce* on it.”

(*f*) *Brown v. Crump*, 1 Marsh. 567, at p. 569.

(*g*) Sect. 9 of next-cited Act.

(*h*) *Post*, p. 294.

(*i*) 6 Edw. 7, c. 56, s. 3 (1).

(*k*) See *post*, p. 295.

(*l*) *Onslow v. Anon.*, *supra*; *Walton v. Johnson*, 15 Sim. 852.

a husbandlike manner, he is bound to maintain and repair the fences and hedges (*m*) (being entitled, however, to take what wood he can find on the premises for the purpose (*n*)); and, if he neglects to do so, an action at the suit of the landlord will lie against him (*o*). And where the tenant has land of his own immediately adjoining the premises demised to him, he impliedly undertakes to keep the latter, during the tenancy, distinct from the former, and so to leave them at the end of the term (*p*). If he fail to do so the Court will make any deficiency in the latter good out of the former (*q*); but in order to obtain this relief the reversioner must be able to show that the person against whom it is applied for is in possession of the land included in the original demise (*r*). The Court may direct an inquiry as to the boundaries even before the end of the term (*s*). A copyhold tenant of a manor is also under an obligation to keep the boundaries of his tenement distinct (*t*).

Different kinds of covenants to be considered.—It is proposed next to discuss *seriatim* the various covenants met with in ordinary leases. These are, on the part of the lessee, covenants to pay rent, to pay rates and taxes, to repair, to insure, to carry on or not to carry on trade, not to assign or underlet the premises, not to commit waste, and to work the demised property in a specified manner. On the part of the lessor, the only covenants calling for notice are the covenant for quiet enjoyment, and the covenant for renewing the lease at its expiration.

(*m*) See *Whitfield v. Weedon*, 2 Chit. 685.

(*n*) Co. Lit. 53 b.

(*o*) *Cheetham v. Hampson*, 4 T. R. 318, per Lord Kenyon, C. J.

(*p*) *Att.-Gen. v. Fullerton*, 2 V. & B. 263.

(*q*) *Aston v. Ezeter (Lord)*, 6 Ves. 288, at p. 293.

(*r*) *Att.-Gen. v. Stephens*, 6 D. M. & G. 111.

(*s*) *Spike v. Harding*, 7 Ch. D. 871.

(*t*) *Searle v. Cooke*, 43 Ch. Div. 519.

DIV. VI.—COVENANTS—(continued).

SECT. 1.—COVENANT TO PAY RENT.

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What rent is, out of what hereditaments it issues, to whom, in what manner, and in respect of what it may be reserved, when it becomes due, where it is payable, and what conditions must be fulfilled upon its reservation,—are matters which have already been discussed (*u*). In addition to the *reddendum*, or the rent-reserving clause, nearly every lease contains a covenant by the lessee for payment of the rent specified; but, independently of the covenant, liability to pay the rent is created by the estate vested in the lessee upon the execution of the deed, and continues until the estate so vested is destroyed (*x*), nor is entry or occupation necessary for it to attach (*y*). Such liability, however, may always be made to depend upon the performance of some condition precedent by the lessor (*z*).

Additional rent on breach of covenant.—In certain leases (especially agricultural leases) where the lessee is, *primâ facie*, to refrain from certain acts, *e.g.*, ploughing up pasture (*a*), or converting land into tillage (*b*), removing produce from the premises (*c*), cultivating the lands on any other than a particular system (*d*), sowing

(*u*) *Ante*, pp. 113—120.

(*x*) *Ward (Lord) v. Lumley*, 5 H. & N. 87, 656, per Martin, B.

(*y*) *Bellasis v. Burbrick*, 1 Salk. 209.

(*z*) *Brook v. Fletcher*, 37 L. T. 100; *Mechelen v. Wallace*, 7 A. & E. 54, n.

(*a*) *Skipworth v. Green*, 8 Mod. 311; *Tritton v. Foote*, 2 Bro. C. C. 636; *Rolfe v. Peterson*, 2 Bro. P. C. 436; *Woodward v. Gyles*, 2 Vern. 119; *Bringle v. Goodson*, 4 Bing. N. C. 726; *Aldridge v. Howard*, 4 M. & Gr. 921; *Bateman v.*

Farnsworth, 29 L. J. Ex. 365; *Carter v. Salmon*, 43 L. T. 490.

(*b*) *Roulston v. Clarke*, 2 H. Bl. 563; *Farrant v. Olmuis*, 3 B. & A. 692; *Birch v. Stephenson*, 3 Taunt. 469; *Denton v. Richmond*, 1 Cr. & M. 734; *Doe v. Bosditch*, 8 Q. B. 973; *Bowers v. Nixon*, 12 Q. B. 558, n.

(*c*) *Pollitt v. Forrest*, 11 Q. B. 949; *Legh v. Lillie*, 6 H. & N. 165; *Massey v. Goodall*, 17 Q. B. 310; *Fielden v. Tattersall*, 7 L. T. 718.

(*d*) *Fuller v. Fenwick*, 3 C. B. 705.

more than a certain quantity of them with a given seed (*e*), or taking from them more than a certain number of successive crops of a specified kind (*f*), mowing for hay without manuring (*f*), parting with the possession of land included in the demise (*g*), &c.,—a stipulation is often met with for the payment of an additional rent proportioned in amount to the extent to which the obligation is disregarded. For example, the stipulation may be for so much extra yearly rent per acre for pasture land ploughed, or per ton for produce carried off the premises, and so in proportion for any greater or less quantity than an acre or a ton. Sometimes the additional rent stipulated for is fixed in amount instead of being made to depend on the extent to which the covenant has been broken: *e.g.*, where the covenant is to reside on the demised premises (*h*), or not to carry on certain specified trades (*i*). (Sometimes the stipulation, instead of being for the payment of a rent, is to pay a single sum as damages, the amount of which is either fixed or is to be determined in the above manner: *e.g.*, for using the premises for immoral purposes (*k*), or, in a mining lease, for not restoring the lands at the end of the term to their original condition (*l*), or for not removing refuse at a specified date (*m*).)

Where the lessee's covenant is not to do the act in question *and if he does* to pay the additional rent (*n*), or where it is not to do the act *under* the increased rent (*o*), by paying such rent he is permitted to do the act. But where the covenant is in absolute terms to refrain from such act, a stipulation for the payment of an additional rent or sum in case of breach will not give him the right of breaking it merely by paying such rent or sum (*p*); and this even though the lease contain a clause of re-entry (*q*) for non-payment of the rent "or of the additional rent where such rent becomes payable," for the effect of such a clause is only to give the

(*e*) *Jones v. Green*, 3 Y. & J. 298.

(*f*) *Bowers v. Nixon*, *supra*.

(*g*) *Id.*; *Greenslade v. Tapscott*, 1 C. M. & R. 55.

(*h*) *Ponsonby v. Adams*, 2 Bro. P. C. 431.

(*i*) *Weston v. Metropolitan Asylum District*, *infra*.

(*k*) *Howard de Walden (Lord) v. Barber*, 19 T. L. R. 183. The covenant here to pay the sum in question if the premises should "at any time during the term be used" for such purposes was clearly absolute in its effect, so as not to require proof of *scienter* for its enforcement.

(*l*) *Re Mexborough and Wood*, 47 L. T. 516.

(*m*) *Elphinstone (Lord) v. Monkland Iron Co.*, 11 App. Ca. 332.

(*n*) *Woodward v. Gyles*, 2 Vern. 119; *Attersoll v. Stevens*, 1 Taunt. 183.

(*o*) *Lagh v. Lillie*, 6 H. & N. 165; *Doe v. Jenson*, 3 B. & Ad. 402 (case of a penalty).

(*p*) *London (City of) v. Pugh*, 4 Bro. P. C. 395; *French v. Macale*, 2 Dr. & War. (Ir.), 269, per Sugden, J. C., where the earlier cases are collected.

(*q*) See *post*, p. 316.

lessor the option either to receive the increased rent or to re-enter (*r*). In the same way, where there is an absolute covenant to do a certain act, with a proviso for the reduction of the rent if that act is performed, the lessee is not entitled to abstain from doing it by payment of the rent in full (*s*).

In accordance with the principles already stated (*t*), additional rent (*u*) (or single sums (*x*)), payable under the above circumstances, is payable as liquidated or ascertained damages in full (*y*); unless of course, also in accordance with those principles, such additional rent is made payable upon the breach of any one of several stipulations of an unequal degree of importance (*z*). Nor does the lessor lose his right to recover it by accepting the original rent only, even if such acceptance be with the knowledge that his right to the increased rent has accrued (*a*). Evidence will not be admitted to show that the actual damage to the land is less than the sum claimed as increased rent (*b*); and where a jury gave the lessor a verdict, but only for the damage he had sustained, a new trial was granted at his instance (*b*). This, however, will not apply to an arbitrator's award, unless such mistake appear on the face of it (*c*). When such additional rent once becomes payable it continues payable until the end of the term (*d*); and where the agreement was to pay it during the last twenty years of the term for every acre of meadow ploughed or converted into tillage during those years, it was held that the additional rent was due in those years if the land was then ploughed, whether it was first ploughed within them or not (*e*).

In the case, however, of holdings to which the Agricultural Holdings Act applies (*f*), it is now provided (*g*) that "notwithstanding any provision in a contract of tenancy making the tenant liable to pay a higher rent or other liquidated damages in the event of any breach or non-fulfilment of a covenant or condition,

(*r*) *Weston v. Metropolitan Asylum District*, 8 Q. B. D. 387; affirmed on appeal, 9 Q. B. Div. 404.

(*s*) *Hanbury v. Cundy*, 58 L. T. 155. Cf. *Kinsman v. Jackson*, 42 L. T. 80, 558, cited *post*, p. 296.

(*t*) *Ante*, pp. 136-7.

(*u*) *Rolfe v. Peterson*, 2 Bro. P. C. 436; *Jones v. Green*, 3 Y. & J. 298.

(*x*) *Supra*, p. 155, at notes (*k*), (*l*), and (*m*).

(*y*) It should not, therefore, be pleaded as a penalty: *Pollitt v. Forrest*, 11 Q. B. 949.

(*z*) *Willson v. Love*, [1896] 1 Q. B. 626.

(*a*) *Denton v. Richmond*, 1 Cr. & M. 734.

(*b*) *Farrant v. Olmuis*, 3 B. & A. 692, per Abbott, C. J., at p. 695, n.

(*c*) *Fuller v. Fenwick*, 3 C. B. 705.

(*d*) *Birch v. Stephenson*, 3 Taunt. 469; *Bowers v. Nixon*, 12 Q. B. 558, n.

(*e*) *Birch v. Stephenson*, *supra*.

(*f*) See 46 & 47 Vict. c. 61, ss. 54, 61; *post*, pp. 728, 729.

(*g*) 63 & 64 Vict. c. 50, s. 6.

a landlord shall not be entitled to recover, by distress or otherwise, any sum in consequence of any breach or non-fulfilment of any such covenant or condition in excess of the damage actually suffered by him in consequence of the breach or non-fulfilment: provided that this section shall not apply to any covenant or condition against breaking up permanent pasture, grubbing underwoods, or felling, cutting, lopping, or injuring trees, or regulating the burning of heather." And, as from the 1st of January, 1909 (*h*), the tenant is to have full right to practise any system of cropping of arable lands, and to dispose of the produce of his holding "without incurring any penalty, forfeiture, or liability" (*i*), but subject to certain restrictions which will be stated hereafter (*k*). It would appear that most kinds of penal rent already referred to (*l*) will be prevented from being effectual by this clause.

Mode, time, and place of payment.—The principles regulating the *mode* in which rent is payable are the same as in the case of any other debt (*m*). Where, for instance, payment of rent is made through the post, it will be at the tenant's risk, unless the landlord has made a request for its transmission in that way (*n*); but such a request may be implied from the fact that a demand has been made in such a way as reasonably to lead the tenant, under all the circumstances of the case, to suppose that he may resort to the post in order to make the payment (*o*). The fact, however, that the payment has been made by post in regular course even for some years is not in itself sufficient; and where, in addition thereto, it appeared that the payer was in the habit of transmitting to the recipient a form of receipt to be signed and returned by him, it was held that there was no evidence that the latter had undertaken to run the risk of loss in the post, and that consequently where such loss occurred there had been no effectual payment (*p*).

The effect of giving a bill or note for the rent depends on the agreement between the parties, the question being one of fact in each particular case (*q*). If given and accepted (*r*) in satisfaction

(*h*) Sect. 9 of next-cited Act.

(*i*) 6 Edw. 7, c. 56, s. 3 (1).

(*k*) *Post*, p. 294.

(*l*) *Supra*, pp. 154–5.

(*m*) See Bullen & Leake on Pleading, pp. 745–6 (6th ed.); Roscoe, N. P. pp. 685 *et seq.* (17th ed.); Leake on Contracts (5th ed.), pt. 4, ch. 7.

(*n*) See *Warwicke v. Noakes*, Peake, 98.

(*o*) See *Norman v. Ricketts*, 3 T. L. R. 182, per Lord Esher, M. R.

(*p*) See *Pennington v. Crossley*, 77 L. T. 43.

(*q*) Bullen & Leake, p. 569.

(*r*) *Drake v. Mitchell*, 3 East, 251.

and discharge of the rent, the transaction amounts to an "accord and satisfaction," and therefore operates as an absolute payment (*s*); nor is it any answer to a plea thus founded that the bill or note has been subsequently dishonoured, though, of course, such dishonour gives a substantive cause of action (*t*). But if merely given and accepted for and on account of the rent, it does not even suspend the right of action (or distress (*u*)) during the running of the security (*x*); for rent, whether reserved by deed or by parol, is a specialty debt (*y*), so that a bond itself will not extinguish it (*z*), and the landlord is not in this way to be deprived of a better remedy open to him—that of distress—than an action on the bill (*a*). An ordinary banker's cheque, however, operates as a conditional payment, so that if it be dishonoured the landlord's remedies remain intact (*b*). It may be added that where in a lease under seal the *reddendum*, expressed in the usual terms "yielding and paying" in advance a certain rent on the usual quarter days, is followed by the lessee's ordinary covenant to "pay" the rent reserved as thereinbefore appointed, what is intended is payment in cash: and in conformity with well-known principles evidence of a parol agreement arrived at between the parties before the execution of the lease, that payment of each instalment of rent should be made by the tenant accepting a bill for the amount payable at a fixed period after date, is inadmissible (*c*).

Payment of rent, if not made to the landlord himself, should be made to a person to whom the landlord has requested it to be made (as his banker (*d*)), or to any other authorized agent (*e*). Where a lease stipulated that a named agent was to receive the rent on behalf of the landlord during the term, it was held that in the absence of anything to show that such a stipulation was for the protection of the tenant it was revocable by the landlord, and that payment of rent by the tenant to such agent, after notice that the agency had been revoked, was consequently bad as against the landlord (*f*). And generally, if payment of rent be made to a person not entitled to receive it—even with the acquiescence

(*s*) Bullen & Leake, *ubi sup.*

(*t*) See *Sard v. Rhodes*, 1 M. & W. 153.

(*u*) *Post*, p. 557.

(*x*) *Davis v. Gyde*, 2 A. & E. 623, explained in *Palmer v. Bramley*, [1895] 2 Q. B. 405.

(*y*) See *Gage v. Acton*, 1 Salk. 325; *Vincent v. Godson*, 4 D. M. & G. 546.

(*z*) 11 Vin. Ab. 289.

(*a*) See per Farwell, L. J., in next-cited case.

(*b*) Byles on Bills, pp. 24, 25 (16th ed.). As to payment by bill or note generally, see *id.*, ch. 23.

(*c*) *Henderson v. Arthur*, [1907] 1 K. B. 10.

(*d*) *Eyles v. Ellis*, 4 Bing. 112.

(*e*) *Roscoe*, N. P. 687.

(*f*) *Venning v. Bray*, 2 B. & S. 502.

(under a false impression) of the person really entitled—it will not be good as against the latter (*g*). From the former, however, if paid to him under a mistake of fact (*h*), it may, in accordance with established rule, afterwards be recovered (*i*).

There are certain cases where a tenant is expressly empowered to deduct payments he may have made from his rent (*k*), and there are others where payments made by a tenant on his landlord's behalf operate *pro tanto* as payments of rent (*l*), and can, therefore, be pleaded as such when rent is sued for. And in addition to these, where a tenant claims to be entitled to receive any sums from his landlord, he may now, upon the latter suing him for rent, avail himself of the large powers of set-off and counterclaim given by the Judicature Acts (*m*). Where a tenant in possession, whilst negotiations for a lease were pending, was informed by the landlord that he would pay for certain improvements if the parties failed to come to terms, it was held that the tenant was entitled to deduct their cost in an action brought to recover rent, though the failure to come to terms was owing entirely to his own act (*n*).

The rules relating to tender are the same in rent as in other contracts (*o*).

A mere agreement, in indulgence of the tenant, altering the mode fixed by a lease for the payment of rent would seem, even though it have been acted upon by the parties, to be without consideration and consequently not binding upon the landlord (*p*).

With regard to *time* (*q*), payment of rent in advance is good as against the landlord himself, or his executors (*r*). Such payment, however, is not a fulfilment of the obligation imposed by the covenant to pay rent, but an advance to the landlord, with an agreement that on the day when the rent becomes due such

(*g*) *Williams v. Bartholomew*, B. & P. 326. See p. 470, *post*.

(*h*) See *Finch v. Tranter*, [1905] 1 K. B. 427; cited *infra*, p. 165.

(*i*) *Newsome v. Graham*, 10 B. & C. 234; *Barber v. Brown*, 1 C. B. N. S. 121.

(*k*) Cp. *ante*, p. 145, note (*f*), and *post*, p. 199. A modern instance of this is in the case of charges for the creation of a compensation fund imposed by quarter sessions on the renewal of existing licences of public-houses, where the deduction may be made "notwithstanding any agreement to the contrary": 4 Edw. 7, c. 23, s. 3.

(*l*) See *post*, p. 558.

(*m*) R. S. C. 1883, O. 19, r. 3. As to the right of distress in such cases, see pp. 558, 559, *post*.

(*n*) *Oleghorn v. Durrant*, 22 J. P. 419. (A case before the Jud. Acts.)

(*o*) See *post*, p. 560.

(*p*) *Re Smith and Hartogs*, 73 L. T. 221, per Vaughan Williams, J. The point was not actually decided, it being held that the agreement in question was merely conditional on its due execution by the tenant, and that the condition had not been fulfilled.

(*q*) See *ante*, pp. 117—119.

(*r*) *Nash v. Gray*, 2 F. & F. 391.

advance shall be treated as a fulfilment of the obligation to pay the rent (*s*). Hence, if the landlord part with the reversion, and the assignee, before the rent has become due, give notice to the tenant of his claim to receive it, the fact that the tenant has already paid it in advance to the landlord will be no discharge to him (*s*); and such notice need not be a formal notice, for one which under all the circumstances of the case brings the claim to the knowledge of the tenant will for this purpose be sufficient (*t*).

Where there is a covenant to pay rent and no particular *place* of payment is specified, the tenant must seek out the landlord in order to make the payment, as a plea that on the day when it became due he was ready with the money *on the land demised*, though sufficient to prevent the landlord from exercising his right of re-entry (*u*), affords no answer to an action on the covenant (*x*).

Remedy by action.—In consequence of the existence of a speedier and more effective remedy for recovering rent by distress (*y*), the action for rent has comparatively seldom to be brought. (It need hardly be said that the mere fact of rent being due does not entitle the landlord to re-enter and exclude the tenant from possession (*z*).) But inasmuch as the conditions required to make a distress lawful are not always fulfilled (*a*), rent is sometimes only to be recovered by action; and sometimes on other grounds this course may be preferred. Nor are the two remedies mutually exclusive: for if the landlord distrains he may, after he has sold his tenant's goods under the distress (but not before (*b*)), bring his action for any balance of rent that remains unsatisfied (*c*). If, however, the rent has been satisfied by the distress this affords a good defence when the rent is due under a demise not by deed (*d*), and though it has been held to furnish no answer to an action *upon the covenant* to pay it (*e*), this was before the Court which so decidedly possessed any equitable jurisdiction.

Again, though a lease by deed for the whole interest of the person granting it (*f*) (or for a greater interest (*g*)) operates in

(*a*) *De Nicholls v. Saunders*, L. R. 5

C. P. 589, per Willes, J.

(*t*) *Cook v. Guerra*, L. R. 7 C. P. 132.

See *post*, p. 463.

(*u*) *Post*, p. 669.

(*x*) *Haldane v. Johnson*, 8 Exch. 689.

The doctrine only applies where the landlord is *intra quatuor maria*: *id.*

(*y*) *Post*, Book II.

(*z*) *Lane v. Dixon*, 3 C. B. 776. And see *post*, p. 316.

(*a*) See *post*, p. 477.

(*b*) *Lehain v. Philpott*, L. R. 10 Ex. 242.

(*c*) *Philpott v. Lehain*, 35 L. T. 855.

(*d*) See *Lear v. Edmonds*, 1 B. & A. 157; *Jones v. Sawkins*, 5 C. B. 142.

(*e*) *Aldridge v. Howard*, 4 M. & Gr. 921.

(*f*) *Beardman v. Wilson*, L. R. 4 C. P. 57.

(*g*) *Thorn v. Woolcombe*, 3 B. & Ad.

law as an assignment (*h*), yet periodical payments reserved by such an instrument, which are not enforceable by distress (*i*), can be recovered as rent by action in spite of the loss of the reversion (*k*). Similarly, where such a lease is not made by deed, so that it cannot operate as an assignment (*l*), it will still enure as a valid letting, so as to allow recovery of the rent by action (*m*) (though not by distress (*n*)), at all events where the intention was to create the relationship of landlord and tenant between the parties (*o*).

Rent being a debt or sum certain payable at a certain time, interest thereon at a rate not exceeding the current rate may be recovered from the time it is payable, if reserved by a written instrument: and if not so reserved, then from the time a demand, giving notice that interest will be claimed from its date until payment, shall have been made in writing (*p*).

Writ and Statement of Claim.

It may be mentioned that an action to recover rent has been held not to be an action to enforce a "contract, obligation, or liability affecting land," so as to entitle the Court (*q*) on that ground (*r*) to allow service of the writ out of the jurisdiction (*s*). It is, however, submitted that a contract "affecting" land means a contract which touches or concerns land so as to run with it (*t*) and bind assignees (*u*), that the covenant to pay rent is such a contract (*x*), and that the decision cannot be regarded as correct (*y*).

Pleadings in actions for rent follow the same rules as in other actions, and as they now consist of statements of fact, it is not proposed to insert in this place illustrations, for which the reader is referred to works on pleading (*z*). It may be stated, however, that an action for rent being "an action to recover a debt or

586; *Wollaston v. Hakevill*, 3 M. & Gr. 297; *Langford v. Selmes*, 3 K. & J. 220.

(*h*) *Post*, p. 413.

(*i*) See p. 484, *post*.

(*k*) *Newcomb v. Harvey*, Carth. 161; *Baker v. Gostling*, 1 Bing. N. C. 19; *Wollaston v. Hakevill*, *supra*; *Williams v. Hayward*, 1 E. & E. 1040; *ante*, p. 114.

(*l*) See *post*, p. 412.

(*m*) *Poultney v. Holmes*, 1 Str. 405; *Palmer v. Edwards*, 1 Doug. 187, n., per Buller, J.

(*n*) See *post*, p. 485.

(*o*) *Pollock v. Stacy*, 9 Q. B. 1033, explaining *Barrett v. Rolph*, 14 M. & W. 348.

(*p*) 3 & 4 Will. 4, c. 42, s. 28.

F.

(*q*) Under R. S. C. 1883, O. 11, r. 1 (b).

(*r*) The case was held, however, to fall within sub-r. (e).

(*s*) *Agnew v. Usher*, 14 Q. B. D. 78. It will be noticed that the action was one against assignees.

(*t*) See *Tassell v. Hallen*, [1892] 1 Q. B. 321, per Collins, J.

(*u*) See *post*, p. 417.

(*x*) *Post*, p. 419.

(*y*) The case was carried to appeal, where (though the appeal was dismissed on another ground) the question was expressly left open: 51 L. T. 752.

(*z*) See Bullen & Leake, pp. 216-8, 706-8 (6th ed.).

M

liquidated demand in money arising upon a contract," whether under seal or not, the writ of summons may be "specially indorsed" with a statement of the remedy which the plaintiff claims (*a*); or it may bear an ordinary indorsement (*b*), the writ being then followed by the delivery of a statement of claim or particulars. And when it is desired to take advantage of the procedure to obtain final judgment notwithstanding the defendant's appearance, the special indorsement must be used (*c*). Where a writ was indorsed with a claim for rent and an unliquidated claim in respect of dilapidations, it was held not to be specially indorsed so as to allow of judgment for the rent (which was not disputed) being entered under the above rule (*d*).

As in other actions, the writ may now (*e*) contain a statement conveying to the defendant the plaintiff's intention, if the former appears, to proceed to trial without pleadings (*f*).

Defences to the action.

Some observations are here subjoined on some of the defences most commonly met with (*g*):—

1. *Assignment (h)*: (*a*) Of term.—If the lessee assign his interest in the premises, the question whether he continues liable for the rent would appear not altogether an easy one to determine. That he does so continue where, as happens in most leases, he has entered into what is usually called an "express" covenant (*i*) (or agreement not under seal (*k*)) to pay it, may be said to be well established. Such covenant is not (after assignment), as between lessor and lessee, one merely of suretyship (*l*), nor is it even any defence to the lessee in an action upon it that the assignee may

(*a*) R. S. C. 1883, O. 3, r. 6 (A.) and (B.); *Arden v. Boyce*, [1894] 1 Q. B. 796, cited *post*, p. 768.

(*b*) "The plaintiff's claim is £ for arrears of rent": R. S. C. 1883, App. A., Pt. III., s. 2.

(*c*) R. S. C. 1883, O. 14, r. 1 (*a*).

(*d*) *Clarke v. Berger*, 36 W. R. 809. The above point does not seem to have been taken in *Hanmer v. Flight*, 35 L. T. 127, but the decision in favour of the plaintiff was reversed by the C. A. on another ground: 36 L. T. 279. It is doubtful whether the case would now fall within the rule as to amendment (R. S. C. 1883, O. 14, r. 1 (*b*)), since it seems probable that the scope of that rule is confined to writs which purport to be specially indorsed. See *post*, p. 768.

(*e*) R. S. C. 1883, O. 18A.

(*f*) The steps which may be taken with a view to a trial without pleadings will be found in the above Order, which, however, is seldom resorted to.

(*g*) Many of the cases here cited are instances, strictly speaking, of "use and occupation" (see p. 397, *post*) and not of rent, but the same principle applies.

(*h*) As to assignment generally, see *post*, pp. 411 *et seq.*

(*i*) *Auriol v. Mills*, 4 T. R. 94; *Parker v. Webb*, 3 Salk. 5; notes to *Spencer's case*, 1 Sm. L. C. at p. 73 (11th ed.).

(*k*) *Boot v. Wilson*, 8 East, 311.

(*l*) *Baynton v. Morgan*, 22 Q. B. Div. 74.

have tendered the rent (*m*). Upon such a covenant, therefore, as upon any express covenant running with the land (*n*), the lessor may sue either lessee or assignee, though he can only have execution against one of them (*o*). But where there is no "express" covenant—*i.e.*, no formally expressed personal undertaking by the lessee—the matter is by no means so clear. It should be mentioned that the cases here spoken of are those where the lessor has assented to the assignment, either by receiving rent from the assignee, or by some other act indicating an intention to accept him as tenant (*p*); for without such acceptance the defence of assignment is of no avail to the lessee (*q*). That the action of *debt* could not, under the old system of pleading, have been maintained against him on the demise after such an assignment is beyond doubt (*r*); the true reason appearing to be, not (as was formerly thought) that such assignment extinguished the privity of contract between lessor and lessee (*s*), but that that action was wholly founded on privity of estate (*t*). The action of *covenant*, on the other hand, was said to be based on a privity collateral to the land (*u*); but the precise effect of the *reddendum* in making a covenant has been a matter of much controversy. By most text-writers it has been said to be a mere covenant in law (*x*). On the other hand, there is strong and direct authority that the ordinary words of the *reddendum*, "yielding and paying" (*y*)—or, in the case of a demise not under seal, holding "at or under" a certain rent (*z*)—do constitute an express covenant or contract. In the proper sense of the term a covenant in law is a covenant which the law itself implies (*a*); and in that sense the

(*m*) *Orygill v. Kemshead*, 4 Taunt. 642.

(*n*) *Barnard v. Godscall*, Cro. Jac. 309; *Bachelour v. Gage*, Cro. Car. 188; *Staines v. Morris*, 1 V. & B. 8. As to covenants running with the land, see *post*, p. 417.

(*o*) *Brett v. Cumberland*, Cro. Jac. 521.

(*p*) *Wadham v. Marlow*, 4 Doug. 54.

(*q*) *Walker's case*, 3 Co. 22 a. The same rule (it is thought) in both its branches—*i.e.*, both where there is an "express" undertaking and where there is not—must apply to parol demises as to those under seal: see *Allcock v. Moorhouse*, 9 Q. B. Div. 366; *Shine v. Dillon*, 1 Ir. Rep. C. L. 277; though where the letting is verbal only, an "express" promise to pay rent could hardly be proved or inferred.

(*r*) *March v. Brace*, 2 Bulst. 151 (reported as *Marsh v. Brace*, Cro. Jac. 334); *Wadham v. Marlow*, *supra*.

(*s*) See *Thursby v. Plant*, 1 Wms. Saund. 277 (ed. 1871), at pp. 298-9.

(*t*) *Wadham v. Marlow*, *supra*; *Thomas v. Cook*, 2 B. & A. 119, per Bayley, J.; *Ward (Lord) v. Lumley*, 5 H. & N. 87, 656. In the language of the old cases, "the land was debtor": per Wilson, J., *Mills v. Auriol*, 1 H. Bl. 433.

(*u*) Per Wilson, J., *ubi supra*.

(*x*) *E.g.*, 1 Wms. Saund. at p. 305; Platt on Covenants, p. 53. There is a note in 1 Sid. 447 to the same effect.

(*y*) 1 Ro. Ab. 519; Com. Dig. Covenant (A. 4); *Newton v. Osborn*, Sty. 387; *Porter v. Sweetnam*, *id.*, 406 (in error); *Hellier v. Casbard*, 1 Sid. 266; *Harper v. Bird*, T. Jo. 102.

(*z*) *Doe v. Kneller*, 4 C. & P. 8, cited *ante*, p. 120.

(*a*) *Williams v. Burrell*, 1 C. B. 402, per Tindal, C. J.

reddendum, if its effect depends on the use of particular words having a known legal operation (*b*), may probably be regarded as such a covenant. In that case it would appear that the lessee's liability would not survive an assignment (*b*). But a reservation, whilst termed a covenant in law, has been held in a well-known case (*c*) to have the same operation as an express covenant to pay rent (*d*). And if that be so, it would not seem easy to escape from the conclusion that the lessee's liability is not determined by assignment. On the whole, however, the opinion has so long and so generally prevailed in the text-books (whether consistently with principle or not) that, in the absence of "express" covenant, the lessee gets rid by assignment of such liability for rent as is created by the *reddendum* (*e*), that it is thought probable that at the present day the Courts would consider that contracts between landlord and tenant were entered into on that footing.

When the lessee assigns, the assignee, as will be explained more fully hereafter (*f*), becomes liable for the rent of the lease by virtue of his privity of estate; but when the lessee parts with his interest by way of *underlease*, in no case will the action lie by the lessor against the underlessee (*g*). Hence, where a lessee assigns part of the demised premises and underlets another part (in each case covenanting to pay the entire rent and to indemnify against its non-payment), and the assignee pays the whole rent under a threat of distress from the lessor, he cannot recover from the underlessee his portion of it by way of contribution, as the two are not liable to a common demand (*h*); at all events where the underlessee has no goods on the premises which the lessor might take by way of distress (*i*).

(*b*) Of reversion.—To an action for rent it is a good defence that the lessor, previously to the rent sued for becoming due, assigned his reversion (*k*), or, conversely, that the rent sued for

(*b*) See *ante*, p. 141.

(*c*) *Paradine v. Jane*, Aleyn, 26.

(*d*) A distinction has frequently been pointed out between a true covenant in law and an implied covenant,—in the sense that it may be spelt out, as a matter of general construction, from the whole instrument: such a covenant being undistinguishable in its legal effect from an express covenant. See *Baynes v. Lloyd*, [1895] 1 Q. B. 820, per Lord Russell, C. J.; *Williams v. Burrell*, *supra*, per Tindal, C. J.; *Birmingham, &c., Banking Co. v. Ross*, 38 Ch. Div. 295, at p. 308, per Cotton, L. J.

(*e*) See, *e.g.*, Bullen & Leake on Pleading, p. 199 (3rd ed.), 217 (6th ed.). There is a *dictum* to the same effect by A. L. Smith, J., in *Baynton v. Morgan*, 21 Q. B. D. 101, at p. 105.

(*f*) *Post*, p. 427.

(*g*) *Holford v. Hatch*, 1 Doug. 183; *ante*, pp. 137–8.

(*h*) *Johnson v. Wild*, 44 Ch. D. 146.

(*i*) *Id.*; *Hunter v. Hunt*, 1 C. B. 300 (see per Maule, J.).

(*k*) *Harmer v. Bean*, 3 C. & K. 307; see *post*, p. 470. Absolute assignments are here referred to; as to assignments by way of mortgage, see note (*n*), *infra*.

accrued due before he obtained the reversion by assignment (*l*). But if the tenant continue to pay the rent to him after the assignment (*e.g.*, by way of mortgage), such payments—provided they are made without notice of the fact of its having taken place (*m*)—will be valid (*n*) until he receive notice from the assignee (*o*) to pay to the latter, who thereupon becomes entitled to all rent which accrues after the notice, as well as to that already in arrear (*p*). In other words, the right to rent of an assignee (or mortgagee) commences from the time of the assignment (or mortgage) and not from that of the notice (*q*). If in disregard of such notice the tenant continue to pay his rent as before, and is afterwards compelled to pay the mortgagee, the sums so paid constitute a voluntary payment which cannot be recovered back from the landlord (*r*).

Somewhat analogous is the case where, without assigning his reversion, the landlord assigns—by writing (*s*)—the benefit of the rent (*t*), as the successive instalments accrue during a certain period, to a third party to whom he is indebted (*u*); for this is an “absolute assignment” (*v*), and on notice of it in writing being given to the tenant will entitle the assignee to receive the rent during the time stipulated and to sue the tenant for it, notwithstanding that the latter may have received notice from the landlord not to pay further instalments to the assignee (*x*).

2. *Surrender, &c.*—That before the accrual of rent alleged to be due the tenant surrendered the demised premises (*y*) to the landlord (or that the tenancy was determined in some other manner (*z*)) is a good plea (*a*), except as to that part of the rent which by force of the Apportionment Act may be apportioned down to the time

(*l*) *Flight v. Bentley*, 7 Sim. 149.

(*m*) *Lumley v. Hodgson*, 12 East, 99.

(*n*) 4 Anne, c. 16, s. 10, *post*, p. 463; and as to mortgages, Jud. Act, 1873, s. 25 (5), *post*, p. 405.

(*o*) But notice from a mere equitable mortgagee affords him no answer to a claim from the reversioner: *Hunt v. Duckworth*, 39 J. P. 168; though if the tenant pays his rent to such claimant in his capacity of equitable mortgagee he cannot afterwards recover it back: *Finck v. Tranter*, [1905] 1 K. B. 427.

(*p*) *Moss v. Gallimore*, 1 Sm. L. C. 514.

(*q*) *Cook v. Moylan*, 1 Exch. 67, per Alderson, B.

(*r*) *Higgs v. Scott*, 7 C. B. 63.

(*s*) Under the Statute of Frauds (sect. 4): *Ex parte Hall*, 10 Ch. Div. 615.

(*t*) *Robins v. Cox*, 1 Lev. 22; *Allen v. Bryan*, 5 B. & C. 512.

(*u*) If such third party has recovered judgment against him, he may enforce it by garnishee proceedings against the tenant (under R. S. C. 1883, O. 45, r. 1). For rent is a debt which may be attached (*Mitchell v. Lee*, L. R. 2 Q. B. 259), provided (in the case where it is made payable at fixed periods) one of such periods has arrived when the order is made: *Barnett v. Eastman*, 67 L. J. Q. B. 517, cited *ante*, p. 124.

(*v*) Within Jud. Act, 1873, s. 25 (6).

(*x*) *Knill v. Prouse*, 33 W. R. 163.

(*y*) As to surrender of part of the premises, see *ante*, p. 126.

(*z*) See *post*, p. 595.

(*a*) See *Smith v. Lovell*, 10 C. B. 6.

of the surrender (*b*); and this surrender may have been either by deed or by operation of law (*c*). Even where a landlord, upon assigning his reversion, gave notice to the tenant that he had agreed with the assignee that the rent should continue to be paid to him, it was held that a surrender by the tenant to the assignee freed him from any claim for subsequent rent by the original landlord (*d*). So a mere agreement to surrender (followed by relinquishment of possession) would now, it is thought, furnish in any court a good defence to the action (*e*). But surrender is no answer to an action for rent which has accrued *before* it took place (*f*), whether such action be founded on an express covenant (*g*) or on a merely parol demise (*h*).

3. *Eviction*.—To an action for rent, eviction, whether by the landlord himself or by a stranger claiming by title paramount, affords a good defence, subject, however, to what is stated hereunder as to apportionment (*i*). In either case it should be clearly set up (*k*). The eviction must be out of the demised premises themselves, or a part thereof out of which the rent issues, and not out of mere easements appertaining thereto (*l*); and it must necessarily have been prior to the accrual of the rent alleged to be due (*m*).

(a) By the landlord (*n*).—To constitute an eviction at law the lessee must establish that the lessor, without his consent and against his will, wrongfully entered upon the demised premises, and evicted him and kept him so evicted (*o*); and if the lessee has sub-let, eviction of his undertenant will, for this purpose, be an eviction of himself (*p*). But actual physical expulsion is not necessary; any act of a permanent character done by the landlord,

(b) See *ante*, pp. 120 *et seq.*

(c) See this matter *post*, pp. 638—641; and for further illustrations on the point, see p. 409.

(d) *Southwell v. Scotter*, 49 L. J. Q. B. 356.

(e) See *Magnay v. Mines Royal Co.*, 3 Drew. 130 (and *op. Gore v. Wright*, 8 A. & E. 118, cited *post*, p. 638), and 2 Sm. L. O. 845—6 (11th ed.), notes to *Doe v. Oliver*. See also *post*, p. 632.

(f) See *Furnivall v. Grove*, 8 C. B. N. S. 496.

(g) *Att.-Gen. v. Cox*, 3 H. L. C. 240.

(h) *Shaw v. Lomas*, 59 L. T. 477.

(i) *I.e.*, in respect of estate: see *infra*, pp. 168, 170. As to apportionment, in

case of eviction, in respect of time, see *ante*, p. 123.

(k) *Dunn v. Di Nuovo*, 3 M. & Gr. 105; *Simons v. Farren*, 1 Bing. N. C. 272.

(l) *Williams v. Haycard*, 1 E. & E. 1040; *Chappell v. Mason*, 10 T. L. R. 404.

(m) *Boodle v. Cambell*, 7 M. & Gr. 386; *Selby v. Browne*, 7 Q. B. 620.

(n) See notes to *Salmon v. Smith*, 1 Wms. Saund. 206 (ed. 1871).

(o) *Baynton v. Morgan*, 21 Q. B. D. 101, per A. L. Smith, J.; *affd.* on appl., 22 Q. B. Div. 74; *Prentiss v. Elliott*, 5 M. & W. 606, per Parke, B.

(p) *Burn v. Phelps*, 1 Stark. 94.

or by his procurement (*g*), with the intention of depriving the tenant of the enjoyment of the premises demised, or any part of them, will be sufficient (*r*). Thus letting the demised premises on their becoming empty during the term to another person (*s*) (unless the tenant has consented thereto) (*t*), accepting rent without the tenant's consent from a person who obtains possession of them (*u*), taking possession of a portion of the premises demised to erect a building thereon (*x*), pulling down a portion of the premises (*y*), making structural alterations in them (*z*) so as to substantially change their character (*a*) (even if the result be to enlarge and not diminish them, inasmuch as the tenant thereby gets something different from what the lessor undertook to let to him) (*b*),—are instances in point.

On the other hand, a temporary trespass by a landlord, unaccompanied by any intention to put an end to the tenancy, is not an eviction (*c*). Thus an entry by the lessor upon the demised premises for the purpose of pulling down a summer-house (*d*), or of repairing a house after a fire (*e*), or putting in a caretaker on finding them deserted by the tenant (*f*), will not have that effect. The question is one of fact (*g*), to be decided by looking, not merely at the act of entry, but at all the circumstances of the case, and the intention with which the entry was made (*h*). If a lessor seek to evict his lessee, upon a breach of covenant giving him the right to avoid the lease, by bringing an action of ejectment (*i*) against him, he cannot afterwards sue for rent *which accrues subsequently*,—as to rent, however, which accrued before, it is otherwise (*k*),—even though there has been no judgment in the

(*g*) *Newton v. Allin*, 1 Q. B. 518.

(*r*) *Upton v. Townsend*, 17 C. B. 30. In *Smith v. Roberts*, 9 T. L. R. 77, where the landlord, in pursuance of an order from the sanitary authority to execute certain repairs, had sent in workmen who remained on the premises an unreasonable time and made them uninhabitable, Lord Esher, M. R., said it was "very like an eviction."

(*s*) *Hall v. Burgess*, 5 B. & C. 332, per Holroyd, J.; *Walls v. Atcheson*, 3 Bing. 462. See post, p. 640.

(*t*) See *Nickalls v. Atherstone*, 10 Q. B. 944, per Patteson, J.; 2 Sm. L. C. at p. 845.

(*u*) *Pellatt v. Boosey*, 31 L. J. C. P. 281.

(*z*) *Smith v. Raleigh*, 3 Camp. 513.

(*y*) *Furnivall v. Grove*, 8 C. B. N. S. 496, per Erle, C. J., and Williams, J.

(*x*) *Upton v. Townsend*, supra.

(*a*) *Baynton v. Morgan*, 21 Q. B. D. 101, per Cave, J.; affd., 22 Q. B. Div. 74.

(*b*) *Upton v. Greenlees*, 17 C. B. 30.

(*c*) *Newby v. Sharpe*, 8 Ch. Div. 39, per Thesiger, L. J.

(*d*) *Hunt v. Cope*, Cowp. 242.

(*e*) *Ison v. Gorton*, 5 Bing. N. C. 501.

(*f*) *Wheeler v. Stevenson*, 6 H. & N. 155.

(*g*) *Upton v. Townsend*, 17 C. B. 30, per Jervis, C. J.; *Henderson v. Mears*, 28 L. J. Q. B. 305.

(*h*) *Newby v. Sharpe*, *ubi sup.*

(*i*) See post, pp. 765 *et seq.*

(*k*) *Birch v. Wright*, 1 T. R. 378.

ejectionment, because he has elected to determine the lease (*l*). Such rent may, however, be recovered in the form of mesne profits (*m*).

As against the landlord himself, an eviction from *part* of the demised premises is an eviction from the whole (*n*); it will consequently entail a suspension of the entire rent while the eviction lasts (*o*), and this, as it seems, whether the tenant remain in possession of the residue or not (*p*). The tenancy, however, is not thereby put an end to, nor is the tenant discharged from the performance of his covenants other than payment of the rent (*q*); and even the tenant's relinquishing the possession and the landlord's taking it will not have that effect unless the tenancy is actually dissolved (*r*).

The effect of the tenant's being unable through the default of his lessor to obtain possession of *all* the premises demised to him is legally the same, as regards the obligation to pay rent (but not necessarily in other respects (*s*)), as where he is afterwards evicted by him (*t*), provided the instrument of demise is incapable of passing any interest at all in the portion affected (*u*). Thus, where a demise not by deed was made of lands, a certain small portion of which had previously been granted by the lessor for a period outlasting the whole term of demise, so that the lessee was unable to enter upon them, it was held that the whole rent was suspended (*u*). But when the demise under similar circumstances, being made by deed, was capable of passing the reversion (*x*) (with the rent incident thereto) in the portion previously granted, it was held that the lessee was liable for the whole rent (*y*).

(b) By a third party.—To constitute a good defence in this case three conditions must be fulfilled. The eviction must have

(*l*) *Jones v. Carter*, 15 M. & W. 718. See p. 656, *post*.

(*m*) See *post*, p. 771.

(*n*) *Upton v. Townsend*, *supra*.

(*o*) Co. Lit. 148 b; *Morrison v. Chadwick*, 7 C. B. 266.

(*p*) Per Parke, B., in *Reeve v. Bird*, 1 C. M. & R. at p. 36 (disapproving *Stokes v. Cooper*, 3 Camp. 514, n.); *Neale v. Mackenzie*, 1 M. & W. 747. In neither of these cases, however, was it actually decided (in accordance with Parke, B.'s dictum, and as it seems with principle) that no payment of compensation in lieu of rent could be enforced if possession of the residue be retained. The law is

also stated to the effect given in the text in 1 Wms. Saund. 211 (ed. 1871).

(*q*) *Hodgskin v. Queenborough*, Willes, 129.

(*r*) *Morrison v. Chadwick*, *supra*; *Newton v. Allin*, 1 Q. B. 518.

(*s*) *Hawkes v. Orton*, 5 A. & E. 367.

(*t*) *Watson v. Waud*, 8 Exch. 335, per Pollock, C. B.; *Holgate v. Kay*, 1 C. & K. 341. (*Tomlinson v. Day*, 5 Moore, 558; 2 B. & B. 680, *semb. cont.*, is explained in next-cited case.)

(*u*) *Neale v. Mackenzie*, 1 M. & W. 747.

(*x*) *Post*, p. 412.

(*y*) *Ecclcs. Commissioners of Ireland v. O'Connor*, 9 Ir. Com. L. Rep. 242.

been from something actually forming part of the premises demised (z): the party evicting must have a good title (a): and the tenant must have quitted against his will (b). Forcible expulsion, however, is not necessary, for it is sufficient if the tenant gives up possession and the person claiming by title paramount (i.e., by a title superior to those both of the lessor and the lessee (c)) enters; nor will it make any difference if an arrangement be then come to between the parties, by which the tenant receives compensation from the claimant for improvements made during the tenancy (d). Though it has been suggested that an eviction by title paramount must be actual and not constructive (e), it seems that it is not necessary for the tenant actually to go out of possession, and that if, upon a claim being made by a person with title paramount, he consents by an attornment (f) to such person to change the title under which he holds (g), or enters into a new arrangement for holding under him (h), this will be equivalent to an eviction and a fresh taking. The question has hitherto most often presented itself in the case of a demise of premises which at the time are already in mortgage; the mortgagee in such a case being, as already pointed out (i), in the position of a stranger claiming by title paramount. It is well settled, however, that a mere notice to the tenant by the mortgagee claiming payment of the rent is not an eviction, and cannot therefore be set up by the tenant so as to defeat the claim for rent of the mortgagor (k); and this applies equally whether the mortgagor's claim is for rent which accrued before such notice (l), or after it (m). Such notice, however, if coupled with attornment to the mortgagee (n), or with payment of rent to him (o), will be equivalent to an eviction, and can be so pleaded to an action for rent by the mortgagor.

Where the eviction by title paramount (p) is only from *part* of

(z) *Delaney v. Fox*, 2 C. B. N. S. 768.

(a) *Paradine v. Jane*, Aleyn, 26; *Jordan v. Twells*, Cas. temp. Hardw. 171; *Mayor of Poole v. Whitt*, 15 M. & W. 571.

(b) *Emery v. Barnett*, 4 C. B. N. S. 423.

(c) Per Lord Denman, C. J., in *Neale v. Mackenzie*, 1 M. & W. at p. 759.

(d) *Carpenter v. Parker*, 3 C. B. N. S. 206.

(e) *Delaney v. Fox*, *supra*.

(f) As to this, see *post*, p. 462.

(g) *Hill v. Saunders*, 4 B. & C. 529; *Doe v. Barton*, 11 A. & E. at pp. 315—316; per Pollock, C. B., in *Mayor of*

Poole v. Whitt, 15 M. & W. 571, and *Hickman v. Machin*, 4 H. & N. 716; *Newport v. Hardy*, 2 D. & L. 921.

(h) *Mountney v. Collier*, 1 E. & B. 630, per Coleridge, J.

(i) *Ante*, p. 58. (Apart from the provisions of the Conv. Act: see p. 61.)

(k) See 1 Sm. L. C. 525 (11th ed.).

(l) *Wilton v. Dunn*, 17 Q. B. 294.

(m) *Hickman v. Machin*, 4 H. & N. 716.

(n) *Id.*, per Pollock, C. B.

(o) *Corbett v. Plowden*, 25 Ch. Div. 678.

(p) See at note (c), *supra*.

the demised premises, the effect (unlike that in the case of eviction by the lessor himself (*q*)) is, not to suspend the whole rent, but to render the tenant liable to have it apportioned (*r*); and this applies even where the tenant holds, not by original contract with the lessor, but by assignment from the lessee (*s*).

A common instance of eviction by title paramount is where demised premises are taken by a public company under the authority of an Act of Parliament, the tenant, however, remaining liable upon the obligations of his lease (and among them upon the obligation to pay rent) until the conveyance of his interest to the company (*t*). And where a yearly tenant gave up possession of his premises to a company (without exacting the compensation to which he was entitled), under the terms of an Act of Parliament which required him to do so upon receipt of a certain notice *and upon payment or tender of such compensation by the company*, it was held that he was liable for the current half-year's rent, as there had been no eviction (*u*).

(*c*) By inevitable accident.—The fact that the tenant has lost the use of the premises demised to him, not by the act of the landlord or of a third party, but by fire or other inevitable accident, affords no answer to a claim for rent becoming subsequently due; and this, whether such claim be founded on an express covenant to pay the rent (*x*), on a contract to the like effect in a demise not under seal (*y*), or on such a contract in a mere parol letting from year to year (*z*). Nor is the result different where the subject of demise is only a floor or flat in a building (*a*). And where both parties agreed that the tenant's liability should cease after fire, it was held that rent *pro rata* could be recovered in an action of use and occupation (*b*), apportioned down to the period when enjoyment of the premises ceased (*c*). Nor does it make any difference that the event of casualties caused by fire is expressly excepted

(*q*) *Supra*, p. 168.

(*r*) *Bac. Ab. Leases* (M. 1); *Neale v. Machenstie*, 1 M. & W. at p. 758, per Lord Denman, C. J. As to apportionment generally, see *ante*, p. 120.

(*s*) *Stevenson v. Lambard*, 2 East, 575.

(*t*) *Mills v. East London Union*, L. R. 8 C. P. 79.

(*u*) *Wainwright v. Ramsden*, 5 M. & W. 602. (The case is imperfectly reported, as will appear from an examination of the sections of the statute cited.)

(*x*) *Monk v. Cooper*, 2 Str. 763; *Bel-four v. Weston*, 1 T. R. 310.

(*y*) *Baker v. Holtzaffell*, 4 Taunt. 45; *Marshall v. Schofield*, 52 L. J. Q. B. 58.

(*z*) *Ivon v. Gorton*, 5 Bing. N. C. 501.

(*a*) *Id.* From this it would appear that the doctrine does not, as seems to have been thought formerly, depend on the tenant's right to enjoy the land after the destruction of what rests on it: see *Bac. Ab. Rent* (M. 2); *ante*, p. 127.

(*b*) See p. 397, *post*.

(*c*) *Packer v. Gibbins*, 1 Q. B. 421.

from the tenant's covenant *to repair* (*d*), this exception being only introduced for his benefit to exempt him from particular repairs (*e*). The Court, in the exercise of its equitable jurisdiction, will not interfere to protect the tenant from such a claim (*f*); nor will it even restrain a landlord, who, having insured the premises on his own account, has received the insurance money, from suing for rent until the premises are rebuilt (*g*).

Most leases, however, contain an express provision for suspension of the rent in the event of loss by fire so long as the premises remain unfit for occupation (*h*). Where it was stipulated that the lessee should pay rent, "damage by fire excepted," and part of the premises were destroyed by fire, it was held that the result was not to suspend the whole rent, but only to entitle the lessee to a proportionate reduction (*i*). And the whole rent will still be payable unless the event which has happened falls directly within the terms of the proviso. Thus, where the proviso stipulated for a suspension of the rent in the event of the premises being destroyed or damaged by "fire, storm, or tempest," and in consequence of overloading one of the floors the whole building fell, it was held that the rent was still payable in full (*k*). And where the provision for suspension of rent was expressed to be in the event of "fire, flood, storm, tempest, or other inevitable accident," it was held that the accidents contemplated were those only which were *ejusdem generis* with those mentioned, and not events arising from the acts or defaults of either of the contracting parties (*l*).

4. *Denial of landlord's title*.—This matter will be found discussed fully under "Estoppel" (*m*).

5. *Illegality*.—It is an answer to the action for rent that the premises were let for an illegal purpose, *e.g.*, one forbidden by a statute, whether public (*n*) or private (*o*); nor does it make any difference that the illegal purpose has not been carried into

(*d*) *Monk v. Cooper*, *supra*; *Belfour v. Weston*, *supra*; *Hare v. Groves*, 3 *Anst.* 687; *Baker v. Holtzapffel*, *supra* (see the report in 18 *Ves.* 115, *infra*).

(*e*) *Weigall v. Waters*, 6 *T. R.* 488, per Lord Kenyon, C. J. See p. 222, *post*.

(*f*) *Holtzapffel v. Baker*, 18 *Ves.* 115.

(*g*) *Leeds v. Chestham*, 1 *Sim.* 146; *Loft v. Dennis*, 1 *E. & E.* 474. See this matter discussed, *post*, p. 241.

(*h*) See for a modern instance in point,

in the demise of a building as a theatre, *Lennox v. Curzon*, 22 *T. L. R.* 611.

(*i*) *Bennett v. Ireland*, *E. B. & E.* 326.

(*k*) *Manchester Bonded, &c., Co. v. Carr*, 5 *C. P. D.* 507.

(*l*) *Saner v. Bilton*, 7 *Ch. D.* 815.

(*m*) *Post*, pp. 466—474.

(*n*) *Gas Light, &c., Co. v. Turner*, 6 *Bing. N. C.* 324.

(*o*) *Flight v. Clarke*, 13 *M. & W.* 155.

effect (*p*). This applies equally whether the letting be by parol or under seal (*q*); nor need the illegality appear on the face of the instrument of demise, as even in the case of a demise by deed extrinsic evidence may always be adduced to prove the illegal object of the parties (*q*). It is also an answer to the action that the premises were let for an immoral purpose, *e.g.*, for that of prostitution (*r*); but (as in the former case) it must be shown that the plaintiff was aware of the use to which his premises were to be put when he let them (*s*), or, at all events, before the period in respect of which the rent he sues for accrued (*t*). It is not necessary for the defendant to show that the plaintiff looked for payment to the proceeds of the immoral acts (*u*).

6. *Statute of Limitations* (*x*).—The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), provides (*y*) that no action shall be brought to recover any land or “rent” but within twelve years (*z*) after the time the right to bring such action first accrues. It is nevertheless settled that this provision does not apply to rent reserved on a demise, but only to a rent existing as an inheritance distinct from the land (*a*).

There are, however, two enactments contained in different statutes passed in the same year (1833), which have not been affected by subsequent legislation, and which do apply to rents reserved on leases. These are, first, the 3 & 4 Will. 4, c. 27, s. 42, which enacts that no action shall be brought to recover arrears of rent but within six years next after they shall have become due (*b*), or after an acknowledgment of the same in writing, signed by the person by whom they were payable or his agent; and secondly, the 3 & 4 Will. 4, c. 42, s. 3, which provides that all actions for rent reserved by deed shall be brought within twenty years after the cause of action has arisen, or (*c*) after an acknowledgment in writing, signed by the party liable or his agent, or after part

(*p*) *Gas Light, &c., Co. v. Turner*, *supra*; *Gibbons v. Chambers*, C. & E. 577, Day, J.

(*q*) *Gas Light, &c., Co. v. Turner*, 5 Bing. N. C. 666, per Tindal, C. J.; *affd.*, *ubi sup.*

(*r*) *Appleton v. Campbell*, 2 C. & P. 317.

(*s*) *Girardy v. Richardson*, 1 Esp. 13.

(*t*) *Jennings v. Throgmorton*, Ry. & M. 251.

(*u*) See *Pearce v. Brooks*, L. R. 1 Ex. 213.

(*x*) The operation of the Statute of Limitations to determine the tenancy itself is discussed *post*, pp. 677 *et seq.*

(*y*) Sect. 1.

(*z*) Formerly this was twenty years: 3 & 4 Will. 4, c. 27, s. 2. In other respects the two sections are identical.

(*a*) *Grant v. Ellis*, 9 M. & W. 113.

(*b*) The Stat. of Lims. 21 Jac. 1, c. 16, s. 3, provides to the same effect.

(*c*) Sect. 5.

payment. The former provision is not impliedly repealed by the latter (*d*), but the latter is to be treated as an exception out of the former, so that actions for rent founded on a deed may be brought within twenty years (*e*). The former statute has for its object to relieve the land from arrears of charges beyond six years, while the latter relates to personal actions only; and the construction of the two Acts taken together is that no more than six years' arrears of rent shall be recovered except in actions founded upon a deed, in which case the limitation shall be twenty years (*f*).

Moreover, sect. 8 of the Act of 1874 (*g*), which provides that no action shall be brought to recover any sum of money secured by any mortgage, or otherwise charged upon or payable out of any land or rent, but within twelve years after the right to receive it shall have accrued to a person capable of giving a discharge for it, though it applies to any action whatever, whether on a covenant or against the land (*h*), leaves the above doctrine untouched, as it does not apply to arrears of rent reserved by a demise (*i*).

Apart too from the foregoing provisions, an occupier of land on being sued for rent may raise as a defence that the plaintiff's title itself has been barred and extinguished by the statute (*k*). So long, however, as the relation of landlord and tenant subsists as a legal relation—as where a term of years granted by deed is actually running (*l*)—the landlord's right to rent is not barred by non-payment for however long a time (*m*), though the statute imposes a limit upon the amount of arrears recoverable (*n*). But in a tenancy from year to year, founded on an agreement not by deed, which there was evidence to show had been impliedly put an end to, though it had never been legally determined, it was held that there having been no occupation (or any act, such as payment of rent, from which a continued tenancy could be inferred) within six years the action for rent would not lie (*o*). And the absence of proof of either payment or demand of rent for a long period (*e.g.*, sixteen years) is in itself evidence of the determination of such a tenancy (*p*).

(*d*) *Humfrey v. Gery*, 7 C. B. 567.

(*e*) *Paget v. Foley*, 2 Bing. N. O. 679; *Donegan v. Neill*, 16 L. R. (1.) 309.

(*f*) *Hunter v. Nockolds*, 1 Mac. & G. 640, per Lord Cottenham, L. C.

(*g*) 37 & 38 Vict. c. 57, re-enacting s. 40 of 3 & 4 Will. 4, c. 27, with the change already referred to: *supra*, note (*e*).

(*h*) *Sutton v. Sutton*, 22 Ch. Div. 511.

(*i*) *Darley v. Tennant*, 53 L. T. 257.

(*k*) *Fursdon v. Clogg*, 10 M. & W. 572. As to this, see *post*, pp. 677 *et seq.*

(*l*) *Grant v. Ellis*, 9 M. & W. 113.

(*m*) *Archbold v. Scully*, 9 H. L. C. 860, per Lord Cranworth.

(*n*) See its effect set out, *supra*.

(*o*) *Leigh v. Thornton*, 1 B. & A. 625.

(*p*) *Stagg v. Wyatt*, 2 Jur. 892.

Remedy for rent in case of execution.—Where the tenant's goods are seized in execution by the sheriff, the landlord, in addition (g) to his ordinary remedy by action, has been provided by statute with a special remedy for recovering certain arrears of rent,—a remedy which has been given to him in consequence of the exemption from his powers of distress which, as will be hereafter seen (r), is enjoyed by such goods as being in the custody of the law (s). The statute in question (8 Anne, c. 14, s. 1) forbids the removal of such goods until the execution creditor has paid a year's rent to the landlord, and upon such payment being made directs the sheriff to levy and pay to such creditor the money so paid for rent in addition to the execution money; so that although, as the result of decisions to be presently noticed, the landlord's remedy if such rent be not paid may be against the sheriff where the latter is in default, the real effect of the statute when its provisions are complied with is to provide a special procedure by which rent in the case of an execution is to be obtained from the tenant. The words of the statute are as follows:—

“No goods or chattels whatsoever lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out shall, before the removal of such goods from off the said premises by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution, provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment as he might have done before the making of this Act; and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money” (t). And it is elsewhere provided (u) that “no landlord of any tenement let at a weekly rent shall have any claim or lien upon any goods taken in

(g) See *Waring v. Dewberry*, 1 Str. 97.

(r) *Post*, p. 501.

(s) *Wharton v. Naylor*, 12 Q. B. 673.

(t) As to execution in the County Court, see *infra*, p. 180.

(u) 7 & 8 Vict. c. 96, s. 67.

execution under the process of any court of law for more than four weeks' arrears of rent; and if such tenement shall be let for any other term less than a year, the landlord shall not have any claim or lien on such goods for more than the arrears of rent accruing during four such terms or times of payment."

The object of the statute of Anne being to compensate the landlord for the loss of his right of distress, it may be laid down for a general rule that the statute only applies where such right cannot be exercised (*x*), or where having been exercised its fruits have been abandoned at the tenant's request (*y*).

The application and effect of the statute may be considered as follows:—

What tenancies.—The relationship of landlord and tenant must exist between the person claiming the rent and the execution debtor, and such relationship must be immediate and not that, *e.g.*, of lessor and sub-lessee (*z*). It may, for instance, be created for this purpose by attornment to a mortgagee (*a*), or by a stipulation in an agreement of purchase for the purchaser to pay a fixed yearly sum to the vendor from the time of taking possession until completion (*b*); and it follows (*c*) that the holding must be at a rent certain (*d*), or at a rent which (as in the case of penal rents (*e*)) becomes certain on the happening of given events (*f*). The relationship must, moreover, be actually subsisting at the time of execution (*g*), so that the landlord cannot take advantage of the statute if he has brought ejectment against the tenant before that time (*h*); nor does the fact that by another section of the statute (*i*) he retains the right of distress under certain conditions for six months after the determination of the tenancy extend his right under the section now considered for a similar time (*k*).

What landlord.—A person having a title on which he could recover in ejectment (*l*) is entitled to the benefit of the Act (*m*). The executor of a deceased landlord is within its scope, by reason

(*x*) *In re Benn-Davis*, 55 L. J. Q. B. 217 (reported as *In re Davis*, 54 L. T. 304).

(*y*) *Wollaston v. Stafford*, 15 C. B. 278.

(*z*) *Bennet's case*, 2 Str. 787.

(*a*) *Yates v. Ralledge*, 5 H. & N. 249.

(*b*) *Saunders v. Musgrave*, 6 B. & C. 524.

(*c*) See p. 115, *ante*.

(*d*) *Riseley v. Ryle*, 11 M. & W. 16.

(*e*) *Supra*, pp. 154—156.

(*f*) *Bateman v. Farnsworth*, 29 L. J. Ex. 365.

(*g*) *Cox v. Leigh*, 1. B. 9 Q. B. 333.

(*h*) *Hodgson v. Gascoigne*, 5 B. & A. 88.

(*i*) See p. 514, *post*.

(*k*) *Cox v. Leigh*, *supra*.

(*l*) See *post*, pp. 765 *et seq.*

(*m*) *Colyer v. Speer*, 2 B. & B. 67.

of the damage sustained by the estate he represents by non-compliance with its provisions (*n*); but an administrator to bring himself within it must have taken out administration before the execution, or at least before the sale of the goods (*o*). A lessee who sub-lets the demised premises in parts is entitled to the benefit of it as against each sub-tenant (*p*).

What rent.—Only that rent can be recovered which is actually due at the time of seizure, and not that which accrues afterwards, though possession be retained by the sheriff (*q*); but if due it makes no difference that it is rent payable in advance (*r*). A full year's rent may be claimed though a portion has been usually remitted to the tenant (*s*); and without any deduction being made for sheriff's fees (*t*). But if there be more than one execution, the landlord cannot have a year's rent on each (*u*), for the statute intends only payment of the year's rent due immediately before the execution (*x*).

What executions.—Although the statute uses the word "plaintiff," it applies equally where the execution is levied by a defendant for the costs of an action brought against him (*y*). It does not, however, apply where the levy is by the landlord himself, for it only contemplates the case where the landlord's rights may be defeated by the intervention of a third person (*z*). A sequestration is apparently an execution "within the equity of the statute" (*a*). But an extent, being a prerogative process in effect operating for the benefit of the Crown, is not an execution within the Act, although the term itself, as will have been seen, is contained in the clause (*b*). And where a writ, though it may have the effect of an execution, is not an execution, application under the statute must be made to the court or tribunal having power to dispose of the proceeds, and the sheriff cannot be treated as a wrong-doer and made amenable as such in the High Court where he does not

(*n*) *Palgrave v. Windham*, 1 Str. 212.

(*o*) *Waring v. Deuberry*, 1 Str. 97.

(*p*) *Thurgood v. Richardson*, 7 Bing. 428.

(*q*) *Hoskins v. Knight*, 1 M. & S. 245; *Gwilliam v. Barker*, 1 Price, 274; *Reynolds v. Barford*, 7 M. & Gr. 449; *In re Benn-Davis*, 55 L. J. Q. B. 217 (reported as *In re Davis*, 54 L. T. 304).

(*r*) *Harrison v. Barry*, 7 Price, 690; *Duck v. Braddyll*, M'Clel. 217; *Yates v. Ratledge*, 5 H. & N. 249.

(*s*) *Williams v. Lewery*, 8 Bing. 28.

(*t*) *Gore v. Goston*, 1 Str. 643.

(*u*) *Dod v. Saxby*, 2 Str. 1024.

(*x*) *Cook v. Cook*, And. 217, per Probyn, J.

(*y*) *Henchett v. Kimpson*, 2 Wils. 140.

(*z*) *Taylor v. Lanyon*, 6 Bing. 536.

(*a*) *Dizon v. Smith*, 1 Swanst. 457.

(*b*) *R. v. De Caux*, 2 Price, 17. Cp. *R. v. Hill*, 6 Price, 19.

comply with its terms; for the statute is confined to executions on judgments (c).

Where the execution is followed by bankruptcy, special considerations arise. It has been laid down for a general rule (d) that the Bankruptcy Acts do not affect a landlord's rights under the statute of Anne, except in the single case where the execution is itself rendered void by the bankruptcy and the landlord has not distrained, because he can then do so (e). By the Bankruptcy Act, 1890 (f), where before the sale of the goods of a debtor taken in execution notice is served on the sheriff that a receiving order has been made against the debtor, he is required to deliver on request the goods and any money received in satisfaction of the execution to the official receiver. It seems clear that a general enactment of this kind cannot interfere with the landlord's rights under the statute of Anne, which is a special enactment applying to a particular case (g); and consequently, goods which belong to a judgment debtor and which are seized by the sheriff, but which are impounded by the statute until the landlord is paid, are not "goods of a debtor" which have to be handed over by the sheriff for the benefit of the creditors generally (g). The above-quoted Act further provides (h)—in the case where the execution is in respect of a judgment for a sum exceeding 20*l.*—that where the goods of a debtor are sold, the sheriff, after deducting the costs of the execution, is to retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition (on which a receiving order is subsequently made) having been presented by or against the debtor, he is to pay such balance to the official receiver or trustee. In accordance with what has just been stated, it has been held that this enactment does not apply to require the proceeds of sale when goods are impounded under the statute of Anne to be handed over free from the rights of the landlord (g). Consequently, if the sheriff, agreeably to long-established usage (i), pays the landlord himself, he will be entitled to deduct the amount from the sum payable, under the foregoing provision of the Bankruptcy Act, to the trustee (j). And it makes no difference

(c) *Brandling v. Barrington*, 6 B. & C. 467.

(d) *In re Mackenzie*, [1899] 2 Q. B. 566 (reported as *Re Neil-Mackenzie*, 81 L. T. 214), explaining, on this ground, *Gethin v. Wilks*, 2 Dowl. 189, and *Lee v. Lopes*, 15 East, 230.

F.

(e) Cp. *supra*, p. 175.

(f) 53 & 54 Vict. c. 71, s. 11, sub-s. (1).

(g) *In re Mackenzie*, *supra*.

(h) 53 & 54 Vict. c. 71, s. 11, sub-s. (2).

(i) See *infra*, p. 179.

(j) *In re Mackenzie*, *supra*, following *In re McCarthy*, 7 L. R. (1.) 473.

N

whether the landlord's notice to the sheriff precedes the sale of the goods (*k*) or follows it (*l*).

What goods.—The statute is not confined merely to goods that are distrainable (*m*). On the other hand, it applies properly only to goods which may be lawfully taken in execution, and not to those which are not the property of the tenant (*n*), though distrainable from being on the premises (*o*). If the sheriff, however, seize and remove such goods, he will be liable for a year's rent to the landlord, as he will be estopped from alleging that he did not take them under colour of the writ (*p*); and this even if he have accounted for them to the real owner (*p*), as, indeed, he will be compelled to do, whether he has paid the landlord or not (*q*). And in the same way, where he removed the tenant's goods after notice that they had passed to his trustee in bankruptcy, he was also held liable to the landlord under the statute (*r*).

Removal.—What the statute forbids is a *removal* of the tenant's goods without satisfying the rent. Hence, where the goods, though seized and sold, are not removed from the premises, the statute does not apply (*s*), even though a bill of sale for their transfer has been executed by the sheriff (*t*). And inasmuch as the object of the statute, as already stated (*u*), is to provide a remedy in lieu of distress, such removal, for the statute to apply, must take place within a reasonable time after sale, as the right of distress would then revive (*x*). The statute, however, is infringed by the removal of any portion of the goods seized (*y*); nor if they be once removed does it make any difference that they have been subsequently returned to the premises (*z*). A removal with the landlord's consent, though such consent be given only on receiving an undertaking (which proves void) to pay the rent, is not within the statute (*a*).

(*k*) *Re Driver*, 80 L. T. 840. (See note *ad fin.*)

(*l*) *In re Mackenzie*, *supra*, following *In re McCarthy*, 7 L. R. (1.) 473.

(*m*) *Riseley v. Ryle*, 11 M. & W. 16. As to this, see *post*, pp. 494 *et seq.*

(*n*) *Beard v. Knight*, 8 E. & B. 865, per Crompton, J.; *Lee v. Lopes*, 15 East, 230, per Lord Ellenborough, C. J.; *Reed v. Thoyts*, 6 M. & W. 410; *White v. Binstead*, 13 C. B. 304.

(*o*) *Post*, p. 476.

(*p*) *Forster v. Cookson*, 1 Q. B. 419.

(*q*) *White v. Binstead*, 13 C. B. 304.

(*r*) *Duck v. Braddyll*, 1 M. & Cl. 217. As to the landlord's position under the

present bankruptcy law, see *supra*, p. 177.

(*s*) *White v. Binstead*, *supra*.

(*t*) *Smallman v. Pollard*, 6 M. & Gr. 1001 (explaining *West v. Hedges*, Barnes, 211); *Smith v. Russell*, 3 Taunt. 400.

(*u*) *Supra*, p. 175.

(*x*) *In re Benn-Davis*, 55 L. J. Q. B. 217 (reported as *In re Davis*, 54 L. T. 304). See *post*, p. 501.

(*y*) *Colyer v. Speer*, 2 B. & B. 67.

(*z*) *Lane v. Crockett*, 7 Price, 566 *Wren v. Stokes*, [1902] 1 I. R. 167, cited *infra*, p. 180.

(*a*) *Rotheley v. Wood*, 3 Camp. 24.

Notice.—To entitle the landlord to the benefit of the statute, notice of his claim (*b*) should be given to the sheriff, but the object of notice to him being only to establish his knowledge of the claim beyond doubt (*c*), proof of such knowledge without actual notice is sufficient (*d*); and if notice be given, its form is immaterial so long as it makes the sheriff aware that the rent is due (*e*). Such notice is in time while the goods or the proceeds of their sale remain in the sheriff's hands (*f*), whether before (*g*) or after (*h*) their removal from the premises. In no case need notice be given to the execution creditor (*i*).

Practice.—The duty of the sheriff under the statute is to call upon the execution creditor to pay the rent, and to refuse to sell any of the goods till it has been paid, even if the value of the goods on the premises be clearly sufficient to satisfy both the rent and the execution (*k*). In practice, however, the sheriff often levies for the rent, and pays the landlord himself (*l*); but he should not do this unless the landlord has made a claim (*m*), and he has ascertained, by examination of the lease if necessary (*n*), that such claim is well founded (*o*). Where notice of the claim has been given to the sheriff, he is bound, as between himself and the execution creditor, to inquire into its validity and effect and to ascertain whether the rent is due (*p*).

Remedy.—If the landlord loses his rent from the sheriff not performing his duty as just described, or if he loses a portion of it from any misconduct on the part of the sheriff in carrying out the sale (*q*), an action founded on the statute (but not an action for money had and received (*r*)) will lie *against the sheriff* (*s*); for the statute states by implication that if he infringes it by selling before the rent is paid, he will be liable to compensate the landlord (*t*).

(*b*) See form in Bullen, *Distress*, 162 (2nd ed.).

(*c*) *Andrews v. Dixon*, 3 B. & A. 645.

(*d*) *Id.*; *Risley v. Ryle*, 11 M. & W. 16, per Parke, B.

(*e*) *Colyer v. Speer*, 2 B. & B. 67.

(*f*) *Arnitt v. Garnett*, 3 B. & A. 440.

(*g*) *Yates v. Ralledge*, 5 H. & N. 249.

(*h*) *Arnitt v. Garnett*, *supra*.

(*i*) *Risley v. Ryle*, 11 M. & W. 16.

(*k*) *Cocker v. Musgrove*, 9 Q. B. 223; *Thomas v. Mirehouse*, 19 Q. B. D. 563, per Lord Esher, M. R.

(*l*) *Windle v. Freeman*, 11 A. & E. 539, per Patteson, J.; *Cocker v. Musgrove*, *supra*. A full account of the manner in

which the practice grow up will be found in the judgment of the C. A. in *In re Mackenzie*, [1899] 2 Q. B. 566 (reported as *Re Neil-Mackenzie*, 81 L. T. 214).

(*m*) *Gawler v. Chaplin*, 2 Exch. 503, per Parke, B.

(*n*) *Augustien v. Challis*, 1 Exch. 279.

(*o*) *Keightley v. Birch*, 3 Camp. 521.

(*p*) *Frost v. Barclay*, 3 T. L. R. 617.

(*q*) *Groombridge v. Fletcher*, 2 Dowl. 853.

(*r*) *Green v. Austin*, 3 Camp. 260.

(*s*) Cases *supra*, *passim*.

(*t*) *Thomas v. Mirehouse*, 19 Q. B. D. 563, per Lord Esher, M. R.

Such an action is not maintainable against the execution creditor (*u*), for he has nothing to do with the removal or sale of the goods (*x*). The landlord, however, instead of bringing an action, may recover by a summary application, founded on affidavits, to the Court, either by way of motion (*y*) or by way of summons (*z*). But such an application, which is for an order for payment of his claim out of the proceeds of sale (*a*), will only succeed when his right to relief is clear (*b*).

Damages.—The measure of damages recoverable by the landlord is *prima facie* the amount of rent due:—*i.e.*, the year's (or part of a year's) rent to which he is entitled under the statute, and of which he has been deprived (*c*). The sheriff, however, may prove in mitigation that the value of the goods was less than the amount of the rent; and in such case the measure of damages is the loss to the landlord by their removal, *i.e.*, their value to him at that time, and not necessarily the mere amount they produce at a forced sale (*d*). And upon a summary application by the landlord (*e*) the sheriff will be allowed, when the goods are not sufficient to satisfy the rent, to deduct such costs as he incurred before notice of the landlord's claim (*f*).

Under County Court process.—The statute of Anne does not apply to executions in the County Court, the County Courts Act, 1888 (51 & 52 Vict. c. 43), providing to that effect (*g*). This Act directs (*g*) that "the landlord of any tenement" in which any goods shall be taken in execution "may claim the rent thereof at any time within five clear days from the date of such taking, or before the removal of the goods, by delivering to the bailiff or officer making the levy any writing signed by himself or his agent which shall state the amount of rent claimed to be in arrear and the time for and in respect of which such rent is

(*u*) See *Palgrave v. Windham*, 1 Str. 212; *Duck v. Braddyll*, M'Clel. 217.

(*x*) *Riseley v. Ryle*, 11 M. & W. at p. 20, per Lord Abinger, C. B.; *Cocker v. Musgrove*, 9 Q. B. at p. 230, per Patteson, J.

(*y*) *West v. Hedges*, Barnes, 211 (explained in *Smallman v. Pollard*, 6 M. & Gr. 1001); *Gore v. Goston*, 1 Str. 643; *Henchett v. Kimpson*, 2 Wils. 140; *Smith v. Russell*, 3 Taunt. 400; *Arnitt v. Garnett*, 3 B. & A. 440; *Williams v. Leucey*, 8 Bing. 28.

(*z*) *Yates v. Rattledge*, 5 H. & N. 249.

(*a*) *In re Mackenzie*, *supra*.

(*b*) *Cook v. Cook*, And. 217.

(*c*) *Wren v. Stokes*, [1902] 1 I. R. 167, where the claim was allowed against a person in the position of execution creditor. See at note (*u*), *supra*.

(*d*) *Thomas v. Mirehouse*, 19 Q. B. D. 563; *Calvert v. Joliffe*, 2 B. & Ad. 418, per Parke, J.; *Foster v. Hilton*, 1 Dowl. 35.

(*e*) See last paragraph.

(*f*) *Henchett v. Kimpson*, 2 Wils. 140; *Foster v. Hilton*, *supra*, per Taunton, J.

(*g*) Sect. 160.

due; and, if such claim be made, the bailiff or officer making the levy shall, in addition thereto, distrain (*h*) for the rent so claimed, and the costs of such distress, and shall not within five days next after such distress sell any part of the goods taken, unless they be of a perishable nature, or upon the request in writing of the party whose goods shall have been taken. And the bailiff shall afterwards sell such of the goods under the execution and distress as shall satisfy, first, the costs of and incident to the sale; next, the claim of such landlord, not exceeding the rent of four weeks where the tenement is let by the week, the rent of two terms of payment where the tenement is let for any other term less than a year, and the rent of one year in any other case; and, lastly, the amount for which the warrant was issued. And if any replevin (*i*) be made of the goods so taken, the bailiff shall notwithstanding sell such portion thereof as will satisfy the costs of and incident to the sale under the execution and the amount for which the warrant issued. And, in either event, the overplus of the sale, if any, and the residue of the goods, shall be returned to the defendant; and the poundage of the high bailiff and broker for keeping possession, appraisement, and sale under such distress shall be the same as would have been payable if the distress had been an execution of the Court, and no other fees shall be demanded or taken in respect thereof."

If the bailiff, for a debt due from the tenant, seizes, under the warrant of the County Court, goods belonging to a stranger on the demised premises (such seizure being consequently wrongful), he cannot under the above provision distrain such goods for the rent of the landlord; and, if he does, the true owner is entitled to have his goods back (*k*). On the other hand, if the seizure is lawful, the fact that it takes place on another person's premises does not prevent the goods so seized from being distrained under the statute for rent due to the landlord of the premises where such seizure takes place (*l*). And so long as the seizure has been lawful in the first instance, there seems to be nothing in the section, which it will be noticed directs the bailiff to "distrain" for the rent claimed, to prevent him from seizing thereupon, in conformity with established rule (*m*), the goods of strangers which he may find on the premises.

(*h*) As to distress, see *post*, Book II.

(*i*) See *post*, p. 584.

(*k*) *Beard v. Knight*, 8 E. & B. 865;

Foulger v. Taylor, 5 H. & N. 202. Cf. p. 178, *supra*.

(*l*) *Hughes v. Smallwood*, 25 Q. B. D. 306.

(*m*) See *post*, p. 476.

The bailiff does not, by receiving notice from the landlord under the Act, become his agent for the purposes of the levy (n).

When goods are seized under process of the Admiralty Division, satisfaction of arrears of rent that may be due is provided for by statute (o).

Div. VI.—COVENANTS—(continued).

SECT. 2.—COVENANT TO PAY RATES AND TAXES.

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This subject may be considered with reference to (A) The construction and effect of the covenant; (B) The particular classes of assessments.

(A) CONSTRUCTION AND EFFECT OF THE COVENANT.

The tenant usually enters into an express covenant to pay rates and taxes. Such a covenant is broken as soon as the rates or taxes are due (if left unpaid), though no demand may have been made for them (p).

Even without such a covenant most kinds of rates and taxes fall upon the tenant, *e.g.*, *poor rates* (except in tenancies where the term is for not more than three months) (q), *assessed taxes* (r), *general district rates* (under the Public Health Act, 1875) (s), *water*

(n) *Gage v. Collins*, L. R. 2 C. P. 381.
As to his fees on proceedings under the section, see *In re Broster*, [1897] 2 Q. B. 429.

(o) 24 & 25 Vict. c. 10, s. 16.

(p) *Davis v. Burrell*, 10 C. B. 821.

(q) *Infra*, p. 210.

(r) *Infra*, p. 212.

(s) *Infra*, p. 213.

and gas rates, &c. (t),—though occasionally the landlord, by express agreement, undertakes liability in respect of them (u).

There are, however, certain assessments which are *prima facie* payable by the landlord, and the burden of which it is the object of the covenant to throw upon the tenant. (*Property tax* (x), *tithe rent-charge* (y), and *extraordinary tithe rent-charge* (z) are exceptions, since the landlord is now prevented directly by statute from imposing these upon the tenant (a).) Such assessments fall under two heads—(a) Assessments of a temporary or recurring nature, e.g., *land tax* (b), and the *rent-charge payable in respect of enfranchised copyholds* (c). (b) Extraordinary assessments imposed in respect of permanent improvements to the land; *sewers rates* (d), and *special assessments under local Acts* (e.g., for paving, sewerage, &c., under the *Metropolis Management Acts* (e)) are instances in point.

The burden of both these classes of assessments the tenant *may* take upon himself by agreement to that effect, and in each case it will depend upon the words in which the covenant is framed whether a particular rate or assessment falls within it or not.

It is to be observed that such an undertaking, instead of being set out formally as a covenant, is sometimes—and with similar effect—to be deduced from an agreement by the tenant, which may, if necessary, be implied (f) in the *reddendum*, to pay his rent “clear of all taxes, charges, and impositions” (g), or “without any deduction or abatement” (h), or “free of all outgoings” (i), or even to pay a “net” rent (k) simply. Sometimes both forms of undertaking on the part of the tenant are found in the same lease, the covenant to pay rent free from the specified deductions being then only material as throwing light upon the other covenant (l); and it has been held that the addition to the express general covenant to pay rates and taxes (m) of a clause, by which he agreed

(t) *Infra*, p. 215.

(u) *E.g.*, *Adams v. Gibney*, 6 Bing. 656 (for poor rates). Other instances are given *infra*, pp. 197—199.

(x) Under 5 & 6 Vict. c. 35. See p. 202, *infra*.

(y) Under 54 Vict. c. 8. See pp. 205—209, *infra*.

(z) Under 49 & 50 Vict. c. 51. See p. 209, *infra*.

(a) For an exception to these exceptions in the case of allotments, see 50 & 51 Vict. c. 48, s. 7, sub-s. (2). See, on this statute, *ante*, p. 54.

(b) Under 38 Geo. 3, c. 5. See p. 204, *infra*.

(c) Under 57 & 58 Vict. c. 46, ss. 8, 17, 27.

(d) Under 23 Hen. 8, c. 5, and amending Acts. See p. 205, *infra*.

(e) 18 & 19 Vict. c. 120, ss. 73, 105; 25 & 26 Vict. c. 102, s. 96.

(f) See *ante*, p. 129.

(g) *Giles v. Hooper*, Carth. 135.

(h) *Bradbury v. Wright*, 2 Doug. 624.

(i) *Parish v. Sleoman*, 1 D. F. & J. 326, disapproving *Cranston v. Clarke*, Sayer, 78.

(k) *Bennett v. Womack*, 7 B. & C. 627.

(l) *Rawlins v. Briggs*, 3 C. P. D. 368, per Lindley, J.

(m) See under next head.

that the landlord should receive his clear yearly rent in net money without any deduction whatsoever, might have the effect of throwing liability upon him for payments from which he would otherwise possibly have been free (*n*).

It is, however, to be noticed that where a statute dealing with an assessment enacts (as usually happens) that nothing contained in it "shall affect any contract between landlord and tenant," the contracts alluded to are those which directly relate to the particular rights of the landlord and tenant under the statute; so that a mere undertaking in a lease on the part of the tenant to pay rent without any deduction does not (as it has been held) oust the right he may possess under an existing statute containing such a provision (*o*), to deduct from his rent the amount of an assessment which he may have paid (*p*). But where an enactment (*o*)—after directing that the payment of certain rates due by the landlord should be enforceable in the first instance (at the option of those collecting it) against the tenant, who might deduct the amount from the next instalment of rent "as if the same had been actually paid . . . as part of such rent,"—provided that nothing therein contained should "affect any contract whatsoever between landlord and tenant," it was held that payment of the rates by a tenant who had covenanted with his landlord to pay them was not payment *pro tanto* of the rent (*q*), that he had no right to deduct the amount he had paid from the rent, and that the landlord's right of distress for the amount of the deduction was unaffected (*r*).

In the absence of a provision of the kind now referred to, a statute, passed subsequently to the grant of a lease containing a covenant by the tenant to pay rent without deducting taxes, will not, by a mere clause authorizing the deduction to be made, repeal the covenant (*s*). It may, however, be stated for a general rule that a covenant to pay a certain rent free from rates and taxes

(*n*) *Barrett v. Bedford (Duke of)*, 8 T. R. 602. The lease contained a further covenant by the tenant to pay a reasonable proportion of the expense of supporting and repairing party walls; and the decision was that he was liable, as against his landlord, to pay half the cost of a new party wall built by the adjoining owner.

(*o*) 25 & 26 Vict. c. 102 (Met. Man. Amdt. Act), s. 96.

(*p*) *Home and Colonial Stores v. Todd*, 63 L. T. 829. It seems proper, however,

to point out that the real bargain between the parties in this case appears to have been that the rent should be paid, not without deduction absolutely, but without certain specified deductions, which the tenant expressly agreed himself to pay, and in which the assessment in question was not comprised.

(*q*) See *infra*, p. 200.

(*r*) *Skinner v. Hunt*, [1904] 2 K. B. 452.

(*s*) *Brewster v. Kitchin*, 1 Ld. Ray. 317; Carth. 438.

will apply to all assessments similar in nature to those subsisting at the time it is entered into, but not to others (*t*). Even where a tenant expressly undertook to pay all "outgoings" (*u*), it was held that the undertaking did not extend to a rate of a new kind, imposed by a statute passed after it was entered into and sanctioning deduction from the rent "in the absence of an agreement to the contrary" (*x*). A covenant to pay rates and taxes may, however, be worded, and usually is worded, so as to include all assessments that may be imposed in the future (*y*). This is usually done by making it comprise "all present and future" outgoings; but a covenant so expressed has only the operation just mentioned, and will not render the lessee liable either for arrears due and payable at the date of the lease (*z*), or (where the outgoings referred to are only those "charged on the premises or the owner") for those which have already become so chargeable at the date of the lease, even though they are only payable afterwards (*a*).

Where a statute, after providing that the exemption which under earlier legislation certain kinds of property had enjoyed from the payment of certain rates should be abolished, directed that the tenant might deduct half such payment from his rent unless he had "specifically contracted to pay such rate in the event of the abolition of the said exemption," it was held that in order to disentitle him to the deduction the contract of demise must contain some specific reference to the possible abolition of the exemption by Parliament, and that a mere general covenant to pay all rates and taxes (*b*)—even if expressly extending to those that might thereafter be imposed (*c*)—was not sufficient.

General type of covenant.—Where the tenant's covenant is of the general type, "*to bear, pay, and discharge all rates, taxes, and assessments which may be assessed or imposed in respect of the demised premises,*" it will apply to all assessments of the former class, *i.e.*, those of a temporary or recurring nature, but not—even apart

(*t*) *Brewster v. Kitchen*, *supra*; *Hopwood v. Barefoot*, 11 Mod. 237.

(*u*) See p. 191, *infra*.

(*x*) *Mile End (Vestry of) v. Whitby*, 78 L. T. 80.

(*y*) See, *e.g.*, *Giles v. Hooper*, Carth. 135; *Watson v. Atkins*, 3 B. & A. 647; *Hurst v. Hurst*, 4 Exch. 571; *Chaloner v. Bolckow*, *infra*.

(*z*) Per Stirling, L. J., in next-cited case.

(*a*) *Surtees v. Woodhouse*, [1903] 1 K. B. 396; cited *infra*, p. 193.

(*b*) *Devonshire (Duke of) v. Barrow Steel Co.*, 2 Q. B. Div. 286. The covenant was to pay rent free of all rates, &c.: see *supra*.

(*c*) *Chaloner v. Bolckow*, 3 App. Ca. 933.

from the Tithe Act, 1891 (*d*)—to tithe rent-charge (*e*), though before that Act it would have comprised this also if it had contained the word “charges” (*f*) or “outgoings” (*g*). It *may*, too, be construed to apply to those assessments which are essentially tenant’s (*e.g.*, poor rates (*h*)), being charged on him in respect of his occupation (*i*); and where the covenant was to pay all rates, &c., imposed on the premises “or on the landlord in respect thereof,” it was held that a rate which, though primarily a tenant’s rate, became payable under special circumstances by the landlord was within it (*k*).

It is, however, with regard to payments of the latter class—those exacted *in respect of permanent improvements to the land*—that the chief difficulties arise.

Covenant to pay assessments.—A very slight acquaintance with the subject will show—as indeed it has frequently been judicially observed—that it is quite impossible to reconcile the decisions upon it; and unfortunately the Court of Appeal, whilst dealing with each case which has come before it on its merits, has shown of late years a strong disinclination to review the earlier decisions, and down to the present time has uniformly declined to overrule formally any of them. It is consequently impossible at present to do more than put forward the opinion that several of them are to all intents and purposes “dead,” although (if the expression may be allowed) as yet uninterred. At the same time, it is difficult to understand or explain the present position of the matter without a short survey of its history; and the following *résumé* is offered accordingly with that object. It will be seen at once that the general tendency of the decisions is strongly in the direction of increasing liability upon the tenant, by reason of the intention now generally imputed to the covenant of enabling the landlord to receive his rent free from deductions of every kind.

The first observation to be made seems to be this—that whilst the clause throwing liability (as between the parties) for rates, taxes, and assessments, upon the tenant is one of considerable

(*d*) 54 Vict. c. 8, *infra*, pp. 205–209.

(*e*) *Jeffrey v. Neale*, L. R. 6 C. P. 240.

(*f*) *Lockwood v. Wilson*, 43 L. J. C. P. 179.

(*g*) *Parish v. Sleeman*, 1 D. F. & J. 328.

(*h*) Cf. p. 182, *supra*.

(*i*) *Hurst v. Hurst*, 4 Exch. 571. It will be seen that owing to the specified exceptions the covenant, as it was held, would have been unmeaning unless so construed.

(*k*) *Parkinson v. Potter*, 16 Q. B. D. 152.

antiquity (*l*), the statutes imposing, in the interests of the public, the liabilities which give rise to the present difficulties, are all modern; so that it appears beyond question that these liabilities are not within the original scope of the covenant.

There is in this respect an important distinction to be observed. Not only do the older statutes, like the Land Tax Act (*m*), make the tenant ordinarily and directly liable for the charge they impose, but (as between himself and the public) the landlord, as will be presently pointed out (*n*), is not liable at all. It is true that the tenant who pays the charge may afterwards deduct it from his rent. But he can only do that if there is no contract between the parties to the contrary. And the object of the clause, as it was originally framed, was simply to provide such a contract between them (*o*). In the modern statutes, on the other hand, where the work or improvement to be carried out is of a permanent or structural character, not only is the *owner* of the premises the party made primarily liable, but it is contemplated throughout that the work required to be done should be done by him, or the payments required to be made should be made by him; and although no doubt payment can be exacted from the tenant, this is only by way of additional security, the object aimed at by this auxiliary process being only, as it has been said (*p*), to attach the landlord's rent in the tenant's hands.

Now, it being premised that the covenants under discussion fall into two distinct classes, according as the tenant undertakes only to *pay money*, or to *do acts* in discharge of obligations which may be imposed with respect to the premises,—the principle established by the earlier cases was, that so long as all the words found in the covenant referred only to money payments, the covenant was concerned with charges of the former kind alone: in other words, that its object merely was to prevent the tenant, who, having paid the sum in question for which he was liable, would have been entitled afterwards to deduct it (in the absence of a contract between the parties to the contrary) from his rent, from making that deduction, by providing a "contract to the contrary" between

(*l*) The undertaking by him to bear impositions is frequently met with in leases at least as early as the end of the seventeenth century. See *e.g.*, *Giles v. Hooper*, Carth. 135, and note (*o*), *infra*.

(*m*) 38 Geo. 3, c. 5. See s. 17.

(*n*) *Infra*, p. 202.

(*o*) This is probably the reason why

in the older cases the tenant's undertaking, instead of being set out as a formal covenant, is usually contained merely in the stipulation that he shall pay his rent free from all charges and impositions. See *supra*, p. 183.

(*p*) Per Montague Smith, J., in *Tidswell v. Whitworth*, L. R. 2 C. P. 326.

them (*g*). Further, that when a payment could be exacted from the tenant, but only by way of additional security, the true party liable being the landlord, and the real object aimed at in providing a remedy against the tenant being only (in accordance with the expression already quoted) to attach the rent in his hands, it was not within the covenant (*r*). It was doubtless in consequence of the rule now in question that it became the practice amongst conveyancers, when it was desired to throw upon the tenant all the liabilities which he was permitted by statute to bear (*s*), to add to the expression "imposed in respect of the premises" words of the type "or on the lessor in respect thereof," or "or on any person in respect thereof," or "or payable by the landlord or tenant thereof."

Great stress throughout the earlier cases was always laid on the presence of such expressions in the covenant (*t*); and during a period of about fifty years after the covenant was first judicially construed (*u*) there is, it is believed, no case in which, where all the words of the covenant were taken to import money payments, the landlord succeeded in throwing upon the tenant liability for payments for which he was not directly liable, without the assistance of one of them (*x*).

Where, however, the words of the covenant are only "rates, taxes, and assessments," it is, in the present state of the authorities, immaterial whether an expression of the kind "or on the lessor in respect thereof" is found therein (*y*) or not (*z*); because the word "assessments" (although not necessarily restricted to apportionments made according to rateable value) (*a*), relates, like the others, only to charges (as it has been held) of a recurring nature (*b*). In the case of a lump sum levied in respect of a single house or premises, *e.g.*, for sanitary improvements ordered by a local authority to be executed therein (*c*), there seems no

(*g*) *Tidswell v. Whitworth*, L. R. 2 C. P. 326. See especially per Willes and Montague Smith, JJ.

(*r*) *Tidswell v. Whitworth*, *supra*; *Allum v. Dickinson*, 9 Q. B. Div. 632.

(*s*) Income tax and tithe rent-charge, as already observed (*supra*, p. 183), are exceptions.

(*t*) See *Foulger v. Arding*, [1902] 1 K. B. 700, per Collins, M. R.

(*u*) The decisions on the subject may be said for this purpose to begin with *Payne v. Burridge*, 12 M. & W. 727, in the year 1844.

(*x*) *Tidswell v. Whitworth*, L. R. 2 C. P. 326; *Rowlins v. Briggs*, 3 C. P. D. 368; *Hill v. Edward*, C. & E. 481, Mathew, J., may be referred to in illustration.

(*y*) *Lyon v. Greenhow*, 8 T. L. R. 457; *Baylis v. Jiggins*, [1898] 2 Q. B. 315; *Lumby v. Faupel*, 88 L. T. 562; *affd.* (C. A.) on another ground, 90 L. T. 140.

(*z*) *Wilkinson v. Collyer*, 13 Q. B. D. 1.

(*a*) *Baylis v. Jiggins*, *supra*.

(*b*) Cases just cited.

(*c*) As in *Lyon v. Greenhow*, *supra*.

reason to doubt that the above construction of the word "assessments" may be regarded as correct. But in the case of an outlay apportioned between different premises belonging to one class or group—*e.g.*, in respect of paving a street upon which the premises all abut (*d*)—it seems difficult, according to the ordinary meaning of language, to understand what the contribution levied upon each of them is if it be not an "assessment" (*e*). And having regard to the strong *dicta* in favour of this view (*f*), and to the fact that the Court of Appeal, in the latest of the decisions now treated of (*g*), expressly refrained (after full argument on the point) from upholding the opinion to the contrary upon which the Court below had founded its judgment, it is thought that those decisions may hereafter be held (so far as the construction of the word "assessments" is concerned) to be open to reconsideration.

However this may be, it may be said to have been gradually (*h*) but firmly (*i*) established that—in the absence of special circumstances (*k*)—words of general import, such as "impositions," "charges," "outgoings," &c., are not to be construed as *ejusdem generis* with "rates" and "assessments," and that they will consequently extend to charges in respect of permanent improvements to the demised property which are the subject of the present discussion (*l*).

Passing next to those covenants which contain a word or words referring to *acts to be performed* by the tenant in fulfilment of obligations imposed with regard to the premises, the rule has become equally well established that the tenant is liable, whether the obligation in question is one imposed solely on the landlord or not, and whether it is one imposed by way of recurring charge or once for all to meet an outlay for a permanent improvement to

(*d*) As in *Wilkinson v. Collyer*, *Baylis v. Jiggins*, and *Lumby v. Faupel*, *ubi sup.*

(*e*) But this is apparently denied by Lindley, J., in *Hartley v. Hudson*, 4 C. P. D. 367, at p. 368: decided, however, in favour of the landlord on another ground. See *infra*, p. 191.

(*f*) See, *e.g.*, *Payne v. Burridge*, 12 M. & W. 727, per Pollock, C. B.; *Thompson v. Lapworth*, L. R. 3 C. P. 149, per Willes, J. In both these cases, where the decision was in favour of the landlord, there were other words in the covenant capable, as will be presently seen, of supporting it.

(*g*) *Lumby v. Faupel*, *supra*.

(*h*) See, for *dicta* to the contrary,

Southall v. Leadbetter, 3 T. R. 458, per Lord Kenyon, C. J.; *Thompson v. Lapworth*, L. R. 3 C. P. 149, per Willes, J.; *Arding v. Economic Printing Co.*, 79 L. T. 420, per Lord Russell, C. J.; *Foulger v. Arding*, [1901] 2 K. B. 151, per Lord Alverstone, C. J.

(*i*) *Arding v. Economic Printing Co.* (C. A.), 79 L. T. 622; *Foulger v. Arding* (C. A.), [1902] 1 K. B. 700.

(*k*) See *infra*, pp. 192 *et seq.*

(*l*) It may be mentioned that where such a word is found in the covenant, the fact that the *reddendum*, in expressing of what payments the rent is reserved clear (cf. *supra*, p. 183) does not contain it, is immaterial: *Gardner v. Furness Ry. Co.*, 47 J. P. 232.

the premises. The reason is that he has then virtually entered into a covenant of indemnity with the landlord (*m*). This applies for instance when he has undertaken to discharge "duties" (*n*), and perhaps also to bear "burdens" (*o*), or to perform "services" (*p*), imposed in respect of the demised premises. In such a case the presence in the covenant of an expression like the one here considered—"or on the lessor in respect thereof"—is wholly immaterial. In a case of this class a tenant has never escaped liability.

Now, it is a somewhat curious circumstance that nearly all the words employed in this connection are possessed of a double signification. Where a tenant undertakes to discharge "impositions," or "charges," or "duties," imposed with respect to the premises demised to him, he undertakes either to bear a burden, or to pay a sum of money (*q*). According to the principle of the older cases, it would be necessary to see whether the word was used in the former or the latter sense, for the tenant would probably have been held liable or not liable accordingly.

It must, however, be admitted that the later authorities exhibit a strong tendency to depart from principle altogether, and to turn on the "magic" of a particular word or words which may be found in the covenant (*r*), irrespective of the meaning which must be attributed to them from the context. According to these decisions, where one of the words just mentioned is met with in the covenant its mere presence is sufficient to render the tenant liable, and it seems quite immaterial that the context shows that in the particular covenant it could not reasonably refer to anything but a money payment. That this is the case with regard to the word "duties" (*s*) has been directly decided (*t*), once by the Court of Appeal (*u*); where it was expressly recognised (*x*) that the word

(*m*) Per Willes, J., in *Tidswell v. Whitworth*, L. R. 2 C. P. 326.

(*n*) *Budd v. Marshall*, 5 C. P. Div. 481. See per Bramwell, L. J.

(*o*) *Sweet v. Seager*, 2 C. B. N. S. 119; *In re Robertson*, 47 J. P. 566.

(*p*) *Sweet v. Seager*, *supra*.

(*q*) See this (as regards the word "duties") explained by Brett, L. J., in *Budd v. Marshall*, 5 C. P. Div. 481.

(*r*) *Foulger v. Arding*, [1902] 1 K. B. 700, per Collins, M. R.

(*s*) It may be mentioned that in all the reported decisions on covenants in which this word has been met with the tenant has been held liable: *Payne v. Burridge*, 12 M. & W. 727; *Sweet v.*

Seager, 2 C. B. N. S. 119; *Thompson v. Lapworth*, L. R. 3 C. P. 149; *Budd v. Marshall*, 5 C. P. Div. 481; *In re Robertson*, 47 J. P. 566; *Clayton v. Smith*, 11 T. L. R. 374; *Wiz v. Rutson*, [1899] 1 Q. B. 474.

(*t*) *Brett v. Rogers*, [1897] 1 Q. B. 525, where the governing word of the covenant was merely the word "pay."

(*u*) *Farlow v. Stevenson*, [1900] 1 Ch. 128. Cp. with this case *Budd v. Marshall*, 5 C. P. Div. 481, where the C. A. some years before were divided in opinion in consequence of a difference as to which of the two meanings the word should receive.

(*x*) See the judgment of Lindley.

"duties," being coupled with the expression "payable in respect of the premises," meant only sums of money which were or might become payable (y). And a precisely similar effect may now safely be attributed to the word "impositions" (z), and to the word "charges" (a), even though these words be unaccompanied by expressions ("or on the lessor, &c.") of the kind already referred to (b).

With regard to the word "outgoings," a word frequently found in the covenant, although it is a word incapable of meaning anything but money payments, it is thought that the rule already adverted to, under which the tenant could not by its mere use be made liable for landlord's burdens (c), cannot any longer be relied upon, that the presence in the covenant of an expression of the type "or on the lessor in respect thereof" already mentioned, upon which many of the decisions in favour of the landlord have to some extent turned (d), cannot, having regard to the later authorities, be considered material, and that the existence of the word in the covenant is now in itself sufficient to render the tenant liable (e).

On the whole it is submitted that the earliest and most important decision in favour of the tenant (f), together with the two others by which it has been followed (g), must be now regarded as overruled; and that the mere presence in the covenant of any of the special words just spoken of will suffice to throw upon the tenant liability for the burdens of the landlord in respect of the demised premises.

M. R. It may be added that it seems difficult to understand why (as there laid down) the express exception of landlord's property tax "excludes . . . the narrow construction" of the covenant, having regard to the fact (see *infra*, p. 202) that it is precisely one of those impositions for which the tenant is directly liable.

(y) In this case it was argued, and for the purposes of the judgment assumed, that the effect of 25 & 26 Vict. c. 102, s. 64, was to take away the possible liability of the tenant, under 18 & 19 Vict. c. 120, s. 85, to be called upon to pay for the work done by the local authority.

(z) *Foulger v. Arding*, [1902] 1 K. B. 700.

(a) *George v. Coates*, 88 L. T. 48; *Hartley v. Hudson*, 4 C. P. D. 367; *Smith v. Robinson*, [1893] 2 Q. B. 53. It may be added that an outlay on premises under a particular statute may be deemed a "charge" without any

express demand for payment having been made by the public authority: *Wiz v. Rutson*, [1899] 1 Q. B. 474. As to charges on the premises, see *infra* p. 193.

(b) *In re Warriner*, [1903] 2 Ch. 367.

(c) *Hill v. Edward*, C. & E. 481, Mathew, J., where, however, reliance seems to have been placed more on the word "impositions" conjoined with it.

(d) *Crosse v. Raw*, L. R. 9 Ex. 209; *Gardner v. Furness Ry. Co.*, 47 J. P. 232; *Aldridge v. Ferne*, 17 Q. B. D. 212; *Batchelor v. Bigger*, 60 L. T. 416; *In re Bettingham*, 9 T. L. R. 48; *Weld v. Clayton-le-Moors District Council*, 86 L. T. 584.

(e) *Foulger v. Arding*, [1902] 1 K. B. 700, per Collins, M. R.; *Antil v. Godwin*, 15 T. L. R. 462; *Greaves v. Whitmarsh*, [1906] 2 K. B. 340.

(f) *Tidswell v. Whitworth*, L. R. 2 C. P. 326.

(g) *Ravilins v. Briggs*, 3 C. P. D. 368; *Hill v. Edward*, *supra*.

Moreover, the distinction upon which that decision was further to a great extent founded cannot, it is thought, any longer be looked upon as valid—*i.e.*, between statutes the primary duty of the landlord under which is simply to pay money to a public authority in respect of work done by the latter for the benefit of the premises (*h*), and statutes the primary duty of the landlord under which is to do the work himself, the power of the public authority to do the work and the resulting liability of the landlord to pay money to them arising only upon his own default (*i*). The view that payments under the latter statutes, unlike those under the former, are not payments “in respect of the premises” at all, but payments in the nature of a penalty in respect of the landlord’s neglect to perform his duty (*j*), cannot, it is submitted, be held good at the present day (*k*). Nor in these cases does it of course make any difference to the tenant’s liability whether the landlord does the work required in obedience to the order from the public authority (*l*), or allows it to be done by the public authority who exact payment from him afterwards (*m*). In the former case, however, the landlord, as it has been held, can only recover if he has done the work under the order and compulsion of the authority (*n*).

There are nevertheless limitations to the general rule just enunciated, that by the mere use of any of the words “duties,” “charges,” “impositions,” or “outgoings” the tenant undertakes liability for the burdens of the landlord, which must not be lost sight of. One is, that the covenant must be assumed to relate only to matters which may reasonably be supposed to have been contemplated by the parties as being within the scope of the contract of demise (*o*). But the fact that the liability in question is one which has reference rather to ownership than to occupation, and that the work in respect of which the payment is made is more for the benefit of the landlord than of the tenant, will not necessarily prevent it from having been within such contemplation (*p*). In

(*h*) *E.g.* the Met. Man. Act, 1855 (18 & 19 Vict. c. 120), s. 105.

(*i*) *E.g.*, the Public Health Act (38 & 39 Vict. c. 55), ss. 94–98, and, as to the metropolis, 54 & 55 Vict. c. 76, ss. 4, 5, 11.

(*j*) *Tidswell v. Whitworth*, *supra*.

(*k*) See *Weld v. Clayton-le-Moors District Council*, 86 L. T. 584.

(*l*) See, *e.g.*, *Budd v. Marshall*, 5 C. P. Div. 481; *Foulger v. Arding*, [1902] 1 K. B. 700.

(*m*) *Hartley v. Hudson*, 4 C. P. D. 367.

(*n*) *Harris v. Hickman*, [1904] 1 K. B.

13. No reference appears to have been made to sect. 12 of the last-cited Act, under which, as it would seem, the landlord was exposed to penalties without notice of any kind: see *Lumley's Public Health*, vol. i. p. 140 (6th ed.).

(*o*) *Foulger v. Arding*, [1902] 1 K. B. 700. See per *Collins, M. R.*, who puts the case of a statutory liability to pull down premises beyond the building line of a street as an illustration of matters not within such scope.

(*p*) *Greaves v. Whitmarsh*, [1906] 2 K. B. 340. Cf. *infra*, p. 195, note (*k*).

the next place, the import of such general words to entail the effect here mentioned is only a presumption which, like other presumptions, may be cut down or displaced by reference either to the covenant itself, or to other covenants or clauses contained in the lease. As an example of a displacement of the former class, a covenant to pay or discharge impositions, &c., *charged on the premises* (*q*), would in all probability still be held to extend only to those legally charged thereon, and not to those imposed on the landlord by a merely personal order (*r*). Similarly, an undertaking to bear and pay outgoings "charged upon the premises or the owner" does not extend to payments which had become so chargeable before, although only payable after, the commencement of the lease (*s*); nor (as it has already been seen) does it make any difference that "present" as well as future outgoings are expressly covered by the covenant (*t*). And exactly the same thing has been held to apply where the covenant was to "pay all rates, taxes, and assessments (*u*) whatsoever which now are or during the said term shall be imposed or assessed upon the said premises or on the landlord or tenant in respect thereof" (*x*). As an example of a displacement of the latter kind the state of things dealt with in one of the cases may be taken, where, with a covenant by the lessees to pay "outgoings," there was conjoined another covenant to pay a fair proportion of all costs and expenses which the lessors as such might be called upon to pay by virtue of any Act of Parliament; and it was held that a sum paid by them which clearly fell within the latter clause (*y*) was not an "outgoing" within the meaning of the former, in which the word "outgoings" must be restricted to payments of a recurring nature (*z*).

Lastly, although a covenant of the kind here described may be framed in the widest possible terms, the statute imposing the liability which it is sought by its means to throw upon the tenant

(*q*) And possibly the same rule would apply to the expressions "imposed on the premises" or "assessed on the premises."

(*r*) *Allum v. Dickinson*, 9 Q. B. Div. 632. In *Bird v. Elwes*, L. R. 3 Ex. 225, a charge "in respect of" the premises seems to have been interpreted (it is thought incorrectly) in exactly the same way. See now as to the word "charges" generally, *supra*, p. 191.

(*s*) *Surtess v. Woodhouse*, [1903] 1 K. B. 396.

(*t*) *Id.* See p. 185, *supra*.

(*u*) The point as to whether the word

"assessments," which had been held in the court below to be insufficient to entail liability on the tenant, was wide enough for the purpose, was, as has been seen (*supra*, p. 189), expressly left open in the C. A.

(*x*) *Lumby v. Faupel*, 90 L. T. 140.

(*y*) The outlay was required by the Factory Act, 1891 (54 & 55 Vict. c. 75), s. 7, now repealed, but re-enacted in substance by the Factory Act, 1901 (1 Edw. 7, c. 22), s. 14.

(*z*) *Arding v. Economic Printing Co.*, 79 L. T. 622. The point next referred to was not taken in this case.

may itself provide a remedy which must be followed to the exclusion of every other, and so prevent the covenant from having its ordinary legal effect. Thus where an Act, after imposing a special duty upon the owner of premises used under certain conditions as factories, as to providing means of escape from fire, directed that if he alleged that the occupier ought to bear or contribute to the expenses of complying with the requirement he might apply to the County Court having jurisdiction, and that that Court, after hearing the occupier, might make such order as appeared to be just and equitable under all the circumstances of the case (*a*), it was held that no action in the High Court to recover the outlay (*b*) could be maintained against the tenant on the covenant (*c*). That the County Court has jurisdiction in a case of this kind to make such order as it thinks just, *irrespective of the legal effect and construction of the covenant*, has also been expressly decided (*d*). So where, by another provision of the same Act (*e*), if premises have been let for a specified purpose—that of a bakehouse—and structural alterations are required in order that the certificate made necessary by the Act should be obtained, it is enacted that the occupier, when he alleges that the owner should bear the whole or part of the expenses, may go to a Court of summary jurisdiction for such order of apportionment as may be deemed by that Court just and equitable under the circumstances of the case, it has been held that the justices are appointed the tribunal to deal with the matter, and that no action is maintainable on the covenant in the High Court (*f*).

The circumstance that the demise is only for a short term (*e.g.*, three years) will not, where the payment in question is not of a kind obviously out of the contemplation of the parties (*g*), affect the tenant's liability (*h*). It has, however, been twice decided that

(*a*) Cf. a similar clause as to private buildings in the metropolis in the London Building Act of 1905 (5 Edw. 7, c. ccix., s. 20).

(*b*) Under 1 Edw. 7, c. 22, s. 14.

(*c*) *Horner v. Franklin* (C. A.), [1905] 1 K. B. 479, in effect overruling *Shephard v. Barber*, 1 L. G. R. 157.

(*d*) *Monk v. Arnold*, [1902] 1 K. B. 761.

(*e*) 1 Edw. 7, c. 22, s. 101; and cf. sect. 7.

(*f*) *Stuckey v. Hooke*, [1906] 2 K. B. 20. There are certain differences in the wording of the two provisions, but

the Court of Appeal held that they were not material. These judgments of the C. A. seem to show that some of the grounds at least of the two decisions of the Divisional Court in *Goldstein v. Hollingsworth*, [1904] 2 K. B. 578, and *Morris v. Beal*, [1904] 2 K. B. 585—and probably the judgment itself in the latter case, at all events if the head-note represents it correctly—cannot be supported.

(*g*) Cf. *supra*, p. 192.

(*h*) *Batchelor v. Bigger*, 60 L. T. 416; *In re Warriner*, [1903] 2 Ch. 367; *Stockdale v. Ascherberg*, [1904] 1 K. B. 447 (C. A.).

this does not hold good in the case of a tenancy from year to year(i); but the distinction is not easy to understand, and it is thought that after the judgment of the Court of Appeal(j) the two decisions just cited can scarcely be considered a safe guide to follow(k). Even the fact that the tenant, owing to a notice under a clause contained in the lease having been given to him to determine the tenancy, and owing to such notice expiring before the work in respect of which the payment is claimed is commenced, can derive no benefit from it of any kind, is no ground for relieving him of that liability(l). The fact too that the subject-matter of an obligation imposed by statute on the landlord is a defect (e.g., in respect of sanitary matters) inherent in the structure of the premises at the time of the demise will not in general absolve the tenant from liability(m). Nor is the circumstance material that the work is in reality in the nature of a repair (as in the case of a repair to drains effected in order to abate a nuisance(n)), and that the tenant is free from liability in respect of it under his covenant to repair by reason of limitations to which that covenant is expressed to be subject(o).

The foregoing results may perhaps be summarized as follows:—

(1) Where any one of the “general words” used in the covenant is capable of bearing the meaning of an act or obligation (i.e., “duties,” “impositions,” or “charges”) the tenant is liable for the expense of all obligations imposed by statute on the landlord which are reasonably within the contemplation of the parties, for these are words of indemnity. In this case it makes no difference whether the covenant contains an expression of the type “or on the lessor, &c.,” or not.

(2) If one of these words occurs, the fact that in the particular connection in which it is met with it cannot refer directly to acts or obligations at all, but must necessarily signify the money payments which result from them, would appear to be quite immaterial.

(3) Where none of the words are capable, in any connotation,

(i) *Valpy v. St. Leonard's Wharf Co.*, 1 L. G. R. 305; *Harris v. Hickman*, [1904] 1 K. B. 13, cited *post*, p. 397.

(j) *Stockdale v. Asherberg*, *supra*.

(k) In the two cases above mentioned the precarious nature of the holding was invoked to show that the work required to be done could not have been within the contemplation of the parties. But it is submitted that in deciding

that question the nature of the work, and that only, can be taken into consideration.

(l) *Wiz v. Rutson*, [1899] 1 Q. B. 474.

(m) See *Foulger v. Arding*, [1902] 1 K. B. 700, per Collins, M. R.

(n) *Smith v. Robinson*, [1893] 2 Q. B. 53.

(o) *In re Bellingham*, 9 T. L. R. 48.

of referring to anything but money payments,—if they do not extend beyond “rates, taxes, and assessments,” the tenant (subject to what is stated in the next rule) is not liable, whether the words “or on the landlord, &c.,” are present in the covenant or not (*p*).

(4) If, however, one of such words be the word “outgoings,” the tenant becomes liable, and this whether the expression “or on the landlord, &c.,” is or is not found in the covenant.

(5) How far he would be liable where in such a case for “outgoings” is substituted some other general word or expression—*e.g.*, “expenses,” “dues,” “demands” (*q*), “levies,” “sums of money,” &c.,—must at present be regarded as doubtful. Possibly (where one of those words is conjoined merely with the expression “payable in respect of the premises”) his liability would still depend on the presence of the words “or by the lessor, &c.,” in the covenant. But it is thought that any of the above words, if conjoined with the expression “imposed in respect of the premises,” would be sufficient to entail liability, on the ground that an outlay so imposed is practically equivalent to, and is indeed undistinguishable from, an “imposition” (*r*).

(6) Whatever be the words employed, the liability of the tenant, where it exists, is only a presumptive liability, and may always be displaced by regard either to the terms of the covenant itself or to other parts of the instrument of demise; whilst it *may* be enforceable only in the special manner and subject to the special conditions provided for by the statute by which liability is created.

Covenant to pay “taxes.”—Sometimes the tenant by his covenant only undertakes to pay “all taxes,” or, as it is often expressed, “all taxes, parliamentary, parochial, or otherwise.” The word “taxes” of itself includes parliamentary taxes (*s*) (which, indeed, it *prima facie* intends (*t*)), and therefore the land-tax (*u*). Even land-tax redeemed by, and payable as a rent-charge to, a former lessee will be comprised under the expression “taxes or assessments” (*x*). It also includes the poor rate (*y*). A parliamentary tax is one imposed

(*p*) But see observations as to the word “assessments” on p. 189, *supra*.

(*q*) This was the “general word” relied on in the direct covenant to pay rates, &c., in *Shephard v. Barber*, 1 L. G. R. 157, referred to *supra*, p. 194.

(*r*) See *George v. Coates*, 88 L. T. 48, C. A.

(*s*) *Arran v. Crisp*, 12 Mod. 54.

(*t*) Per Holt, C. J., *Brewster v. Kitchen*, 1 Ld. Ray. 317; Carth. 438.

(*u*) *Amfield v. White*, Ry. & M. 246; *Manning v. Lunn*, 2 C. & K. 13.

(*x*) *Christ's Hospital v. Harrild*, 2 M. & Gr. 707.

(*y*) *Mitchell v. Fordham*, 6 B. & C. 274 per Abbott, C. J.

and assessed directly by Act of Parliament (z), and for the benefit of the whole kingdom (a). A tax, the mere collection of which is regulated by an Act of Parliament enacted to provide a more convenient mode of raising it, but which was in existence before the Act, is not such a tax (b).

Damages.—The measure of damages for breach of the covenant by the tenant to pay rates and taxes is, of course, different according as the rates or taxes are primarily payable by him or not. If the tenant covenants to pay his own taxes (for which the landlord is not liable at all, except by means of legal process against his premises), the measure of damages would be the injury to the reversion—*e.g.*, by a distress being put in to the premises, &c. (c). When he covenants to pay landlord's taxes the question can hardly arise, as these taxes have nearly always to be borne by him in the first instance (d); but the whole amount of the tax would be recoverable (e). Nor can it well occur where the covenant to pay taxes (of either class) is by the landlord (f), as the tenant can generally deduct the tax from his rent (g); but if he prefer to sue, he can recover the amount of the tax, subject to any diminution the landlord may claim (f) in consequence of the tax having been increased since the making of the lease (h).

Covenant by the lessor.—Where the obligation to pay rates and taxes—either all taxes (i) or merely certain specified ones (k)—is on the lessor, whether by express agreement or (in the case of landlord's taxes) in the absence of stipulation to the contrary, it does not extend to the amounts to which, in consequence of improvements to the premises, such rates and taxes may become raised (l). The lessor performs his agreement if he pays on the rent he receives (m), and any excess arising from the difference between the amount of such rent and the improved annual value

(z) *Palmer v. Earith*, 14 M. & W. 428.

(a) *Bedford Union (Guardians of) v. Commrs. of Bedford*, 7 Exch. 777, per Alderson, B.

(b) *Baker v. Greenhill*, 3 Q. B. 148, per Lord Denman, C. J.

(c) Mayne on Damages, p. 299 (7th ed.).

(d) *Infra*, p. 199.

(e) Mayne, *ubi sup.* Not, however, in an action for money paid: *Spencer v. Parry*, 3 A. & E. 331.

(f) See the next paragraph.

(g) *Infra*, p. 199.

(h) *Watson v. Home*, 7 B. & C. 285.

(i) *Id.*; *Graham v. Wade*, 16 East, 29; *Watson v. Atkins*, 3 B. & A. 647.

(k) *Smith v. Humble*, 15 C. B. 321; *Yaw v. Leman*, 1 Wils. 21; *Hyde v. Hill*, 3 T. R. 377.

(l) *Smith v. Humble's, supra*, and other cases under this head.

(m) *Whitfield v. Brandwood*, 2 Stark. 440.

of the premises will fall on the lessee (*n*), even when the lessor's covenant is to pay all taxes "already charged or to be charged" on the premises (*o*). So where a lessor covenanted to pay rates and taxes in respect of the yearly rent received, and the tenant expressly agreed to pay all such "further or additional" rates as might be imposed on the premises, it was held that he was bound to defray all increase of rates beyond the proportion in which the premises were rated at the time of the demise (*p*). And where the lessor's covenant was to pay all rates and taxes then chargeable on the premises or on the yearly rent reserved, and the lessee expressly undertook to pay all "fresh" rates and taxes which should thereafter be charged upon the premises, it was held that the lessee was liable, not only for fresh taxes, but for all such additions to the taxes formerly chargeable as were occasioned by the improved value of the premises (*q*).

A covenant by the lessor to pay all the taxes on the lands demised will not extend to essentially tenant's assessments, such as poor rates, inasmuch as these are merely personal charges on the occupier (*r*).

A covenant by the lessor, in the lease of certain portions of a building for business purposes, "to pay all rates and taxes chargeable in respect of the demised premises," has been held to render him liable for a water rate, though to some extent such payment is in the nature of one for goods sold and delivered (*s*). And notwithstanding doubts which have been entertained as to the correctness of this decision (*t*), it has been followed in a recent case in the Court of Appeal (where the covenant, with an immaterial exception, was in exactly the same terms), on the ground that some water supply (*u*) to the premises was clearly within the contemplation of the parties as being necessary for their occupation (*x*). On the other hand, a covenant by the lessor to pay "all rates, taxes, and impositions, whatsoever" and howsoever "imposed," which might be assessed on the demised premises or on the landlord or tenant in respect of them, has been held to apply only to rates, &c., which are of a compulsory nature, and not to

(*n*) *Smith v. Humble*, *supra*.

(*o*) *Watson v. Home*, *supra*.

(*p*) *Graham v. Wade*, 16 East, 29.

(*q*) *Watson v. Atkins*, 3 B. & A. 647.

(*r*) *Theed v. Starkey*, 8 Mod. 314. See *infra*, p. 210.

(*s*) *Spanish Telegraph Co. v. Shepherd*, 13 Q. B. D. 222.

(*t*) See per Buckley, J., in next-cited case, 95 L. T. 139.

(*u*) There was no separate assessment, at the time of the demise, of the part of the building which was its subject.

(*x*) *Bourne v. Salmon & Gluckstein*, [1907] 1 Ch. 616. The decision professes to be based entirely on the circumstances of the particular case.

render him liable for payment (though enforced by what is termed by statute a "rate") for water supplied to the premises, inasmuch as such payment is voluntary on the part of the tenant, and a charge to which a person can only be made liable with his own consent cannot be properly said to be "imposed" upon him (*y*). So where a lessor undertook to pay "all rates, taxes, and assessments, water rate, and other outgoings (except the gas and electric light) now or hereafter to be imposed or assessed upon the premises or on the lessor or lessees in respect thereof," and the premises were supplied with water under an Act by which the undertakers were bound upon demand to furnish it for domestic purposes (at a rate calculated upon the annual value of the premises), whilst water supplied for trade purposes was made by the Act a matter for special agreement between the undertakers and the owner or occupier, it was held that liability upon the covenant applied to water of the former description but not of the latter (*z*).

Remedies of tenant.—A landlord may be liable to his tenant for a tax in one of two ways: either because he has expressly undertaken to pay it, or because the statute imposing it provides that he shall bear the burden of it. In the former case the tenant upon paying the tax may either sue to recover it* (*a*), or (subject to what is stated hereafter as to his liability to distress (*b*)) may deduct the amount from his rent (*c*). In the latter case the statute nearly always expressly empowers him to deduct (*d*)—*i.e.*, after having paid the tax (*e*), so that if he be assessed below his rent he can only deduct what he actually pays (*f*),—and he cannot sue unless the landlord can be compelled by force of the statute to pay the tax himself (*g*). In most so-called "landlord's taxes" the landlord is not, as between himself and the public, liable for the tax at all (*h*), and where this happens the tenant *must* deduct from his rent, and cannot in the absence of special circumstances (*i*) (*e.g.*, where in

(*y*) *Badcock v. Hunt*, 22 Q. B. Div. 145, C. A.

(*z*) *In re Floyd*, [1897] 1 Ch. 633. The fact that the premises were, to the knowledge of the lessor, expressly taken for purposes of trade was not treated as at all material.

(*a*) *Watson v. Home*, 7 B. & C. 285.

(*b*) *Post*, p. 558.

(*c*) *Graham v. Tate*, 1 M. & S. 609.

(*d*) See, *e.g.*, 5 & 6 Vict. c. 35, s. 60 (property tax); 38 Geo. 3, c. 5, s. 17 (land tax); 6 & 7 Will. 4, c. 71, s. 80

(tithe rent-charge); 25 & 26 Vict. c. 102, s. 96 (Met. Man. Amdt. Act: referred to *supra*, p. 184); 38 & 39 Vict. c. 55, ss. 101, 214 (Public Health Act), &c.

(*e*) *Ryan v. Thompson*, L. R. 3 C. P. 144; *Pocock v. Eustace*, 2 Camp. 181.

(*f*) See *Sherington v. Andrews*, Comb. 483.

(*g*) *Earle v. Maugham*, 14 C. B. N. S. 626.

(*h*) *Infra*, p. 202.

(*i*) See, *e.g.*, *Lamb v. Brewster*, 4 Q. B. Div. 607, cited *infra*, p. 203.

consequence of having quitted before the tax was demanded he lost his opportunity of deducting (*k*)) recoup himself in any other manner (*l*).

The deduction, too, in the latter case must be made from the instalment of rent next payable (*m*); for where a tenant pays his rent in full after having already paid a landlord's tax, such fresh payment of the amount of the tax—unless made either under a distress for the whole rent (*n*), or with an express saving of his rights in order to prevent a distress (*o*)—is voluntary, and he cannot afterwards recover it, either by action (*p*) or by deduction from subsequently accruing rent (*q*). So, on the other hand, where a landlord with full means of knowledge of the circumstances allowed certain sums in respect of taxes, in excess of what he was liable to pay, to be deducted from his rent, it was held that such an allowance operated as a payment, and that the sums in question could not afterwards be recovered (*r*). Payment of a landlord's tax operates in law as a payment *pro tanto* of rent (*s*) and can be so pleaded by the tenant (*t*), the question of liability as between the parties to any given assessment being often decided in this way (*u*). So where a landlord requested his tenant to pay certain rates on his behalf, agreeing that such payments should be set off against rent, it was held that they operated *pro tanto* as payment of it, and that the fact that such rates were to the landlord's knowledge irregularly assessed upon him made no difference (*x*). And where a tenant who has paid a landlord's tax hands over the receipt to one who succeeds him in the tenancy, the latter may take advantage of it so far as it exonerates him and plead the payment as if made by himself (*y*). The amount which the tenant is entitled to deduct is properly proved by producing the assessment (*z*), though calling the collector has been held sufficient for this purpose (*a*).

(*k*) *Dawson v. Linton*, 5 B. & A. 521.

(*l*) Cf. *Earle v. Maugham*, *supra*, per Williams, J., at p. 629.

(*m*) See specially with regard to property tax and land tax, *infra*, pp. 202, 204.

(*n*) *Graham v. Tate*, 1 M. & S. 609.

(*o*) *Baker v. Greenhill*, 3 Q. B. 148.

(*p*) *Denby v. Moore*, 1 B. & A. 123; *Saunderson v. Hanson*, 3 C. & P. 314; *Cumming v. Bedborough*, 15 M. & W. 438, per Parke, B.; *Spragg v. Hammond*, 2 B. & B. 59.

(*q*) *Andrew v. Hancock*, 1 B. & B. 37; *Stubbs v. Parsons*, 3 B. & A. 516; *Dawes v. Thomas*, [1892] 1 Q. B. 414; *Mile End (Vestry of) v. Whitby*, 78 L. T. 80.

(*r*) *Bramston v. Robins*, 4 Bing. 11 (in this case the erroneous allowance had been made during a period of seventeen years); *Waller v. Andrews*, 3 M. & W. 312, is to the same effect.

(*s*) See, for instance, 5 & 6 Vict. c. 35, s. 60 (property tax); 38 Geo. 3, c. 5, s. 18 (land tax).

(*t*) *Tinckler v. Prentice*, 4 Taunt. 549; *Baker v. Davis*, 3 Camp. 474; *Franklin v. Carter*, 1 C. B. 750.

(*u*) See, e.g., *Graham v. Wade*, 16 East, 29; *Lobban v. Cook*, 3 H. & N. 238.

(*x*) *Roper v. Bumford*, 3 Taunt. 76.

(*y*) *Glennell v. Read*, 7 Taunt. 50.

(*z*) *Gabell v. Shevell*, 5 Taunt. 81.

(*a*) *Philips v. Beer*, 4 Camp. 266.

Payment of rates and taxes on bankruptcy.—It is provided by statute (b), that in the distribution of a bankrupt's property "all parochial or other local rates due from the bankrupt . . . at the date of the receiving order . . . and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, property or income tax assessed on the bankrupt . . . up to the 5th day of April next before the date of the receiving order . . . and not exceeding in the whole one year's assessment,"—are to be paid forthwith and in full (subject to the retention of such sums as may be necessary for the costs of administration or otherwise (c));—but *pari passu* (d) with wages or salary (not exceeding 50*l.*) to any clerk or servant for services rendered within four months before the receiving order, and wages (not exceeding 25*l.*), whether payable for time or for piece-work, to any labourer or workman for services rendered within two months before the receiving order, as well as now (e) with the amount (not exceeding 100*l.*) due in respect of any compensation, payable under the Workmen's Compensation Act, the liability for which accrued before the receiving order. But "where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority in respect of the whole of such sum, or a part thereof, as the Court may decide to be due under the contract, proportionate to the time of service, up to the date of the receiving order" (f).

The Act equally applies where a company is wound up, the commencement of the winding-up being substituted for the date of the receiving order (g); and also where a person dies insolvent, the date of his death being in this case substituted for that date (h). But it deals simply with preferential payments to be made *by the person who holds the funds to be distributed out of the assets in his hands*, and it is a direction as to the mode in which payments are to be made to the effect that out of the sums distributable by him what are treated as preferential debts are to be paid first (i). There is, therefore, no preferential charge, for instance, in respect of rates on effects of a company in the hands of a receiver for debenture-holders when the company is being wound up; for

(b) 51 & 52 Vict. c. 62, s. 1.

(c) Sub-s. 3.

(d) Sub-s. 2.

(e) 6 Edw. 7, c. 58, s. 5.

(f) 51 & 52 Vict. c. 62, s. 1.

(g) Sect. 1, sub-s. 1.

(h) Sect. 1, sub-s. 6. *In re Haywood*, [1897] 2 Ch. 593.

(i) Per North, J., in next-cited case.

though the preferred creditors are to be paid out of the assets before any other creditors, that does not affect persons who are not claiming as creditors in the winding-up at all, but who hold security upon property which the company has in some way charged in their favour (*k*).

(B) PARTICULAR CLASSES OF ASSESSMENTS.

I. Landlord's taxes.—These, as already stated, are property tax, land tax, sewers rates, and tithe rent-charge; to which may be added those assessments under local Acts which are levied in respect of *permanent* improvements to property (*l*). Some observations are here appended on each of these “landlord's taxes” in the above order; but, as already mentioned (*m*), such taxes are only *primâ facie* payable by the landlord, as they are all (with the exception of the property tax and tithe rent-charge) capable of being transferred to the tenant by agreement. It is further to be observed, that a tax of this class is only a landlord's tax *as between landlord and tenant themselves*, and not with respect to the public (*n*), as the landlord cannot be made directly liable to pay it (*o*).

Property tax.—By 5 & 6 Vict. c. 35, it is provided that the occupier of any lands or tenements upon paying the tax under that Act shall deduct so much thereof in respect of the rent payable to the landlord for the time being (*p*) as the rate of the tax to the pound amounts to from the first payment he afterwards makes on account of rent (*q*); that the landlord shall allow such deduction (*q*) under a penalty of 50*l.* for each refusal (*r*); that such payment shall discharge the tenant from so much rent (*s*); that no agreement between landlord and tenant or any other persons touching the payment of taxes shall be deemed to extend to the property tax (*t*); and that all agreements entered into for the payment of rent in full, without allowing deduction for property tax, shall be utterly void (*u*). This latter provision, however, only invalidates such an

(*k*) *Richards v. Overseers of Kidderminster*, [1896] 2 Ch. 212.

(*l*) See p. 183, *supra*.

(*m*) *Supra*, p. 183.

(*n*) *R. v. Mitcham*, 1 Doug. 226, n., per Buller, J. (land tax).

(*o*) *Cumming v. Bedfordborough*, 15 M & W. at p. 440, per Pollock, C. B. (property tax).

(*p*) So that if assessed at a greater amount than that of his rent, a portion of the tax falls on him.

(*q*) Sect. 60 (Sched. A. No. 4, r. 9).

(*r*) Sect. 103.

(*s*) Sect. 60.

(*t*) Sect. 73.

(*u*) Sect. 103.

agreement so far as that agreement relates to the property tax, and leaves it in full force so far as it relates to other taxes (*x*). Nor does it render invalid either an agreement which provides for the payment of a certain rent, subject to a diminution on the repeal or suspension of the property tax (*y*), or an agreement that if the tenant pays his rent in full without deduction for the tax, the landlord will subsequently repay to him all the sums he has so overpaid (*z*). Where a statute (*a*) provided that a tenant might make, in respect of certain charges levied under it, "deductions" from his rent (*b*), it was held that it in no way altered the "rent payable" under the Act now in question (*c*).

By 16 & 17 Vict. c. 34, every person "liable to the payment of any rent" shall be entitled, on making such payment, to deduct thereout the amount of the rate of property tax which at the time when such payment becomes due shall be payable (*d*), or a proportionate amount of the several rates of property tax chargeable in respect of such rent during the period through which the same was accruing due (*e*). But he shall not be entitled to deduct any greater sum than the amount of the duty assessed upon the property and actually paid by him (*f*).

Tenants who are called upon to pay arrears due from former occupiers of their premises may, upon payment, deduct the amount, or any portion thereof, from "any subsequent payment of rent" to the landlord (*g*).

In the case of dwelling houses under the annual value in the whole of 10*l.* (*h*), of premises let for a less period than one year (*h*), and of a house let in different apartments or tenements (*i*) (which, though occupied by more than one person, is to be charged to the duty as one entire tenement (*k*)), the assessment to the property tax is made on the landlord, though power is reserved upon his default to resort to the occupier; and, in the last case, the occupier, upon paying the duty, is expressly authorized

(*x*) *Fuller v. Abbott*, 4 Taunt. 105; *Tinckler v. Prentice*, *id.*, 549; *Gaskell v. King*, 11 East, 165.

(*y*) *Colbron v. Travers*, 12 C. B. N. S. 181; *Beadel v. Pitt*, 11 L. T. 592.

(*z*) *Lamb v. Brewster*, 4 Q. B. Div. 607.

(*a*) 4 Edw. 7, c. 23, s. 3.

(*b*) See *ante*, p. 159, note (*k*).

(*c*) *Hancock v. Gillard*, [1907] 1 K. B. 47.

(*d*) Sect. 40.

(*e*) 27 & 28 Vict. c. 18, s. 15.

(*f*) 16 & 17 Vict. c. 34, s. 40.

(*g*) Sect. 35.

(*h*) 5 & 6 Vict. c. 35, s. 60 (Sched. A. No. 4, r. 3).

(*i*) 16 & 17 Vict. c. 34, s. 36.

(*k*) Distinguish from this the case of a house divided into distinct properties, and occupied by distinct owners or their tenants: 5 & 6 Vict. c. 35, s. 60 (Sched. A. No. 4, r. 13).

to deduct the amount from "the next, or any subsequent payment" of rent (*l*).

Where the owner of premises assessed to the property tax is entitled to exemption or abatement, the duty to obtain the relief is upon him (*m*): so that a tenant has a right to deduct from his rent the amount of the tax assessed upon and actually paid by him, where the relief, though it has before such payment been claimed by the landlord, has not in fact yet been obtained (*n*).

Land tax.—The principal Act relating to the land tax—which as already mentioned (*o*) is a "parliamentary" tax—is 38 Geo. 3, c. 5 (*p*), which directs that the tax is to be charged upon all persons having or holding lands or hereditaments in respect thereof (*q*). As in the case of the property tax, the tenant is required to pay the tax in the first instance, and to deduct out of his rent (subject, however, to any agreement to the contrary (*r*)) so much of the tax as in respect of such rent the landlord ought to bear (*s*), the payment discharging him from so much rent (*t*). In accordance with what has been already stated (*u*), the lessor is bound to pay (and therefore the lessee is entitled to deduct) such proportion only of the tax as the reserved rent bears to the total annual value (*x*). The land tax, being a charge upon persons "having or holding" tenements (*y*), is only to be paid by the landlord in full where he receives the whole of the profits (*z*). Hence, where a tenant, in consideration of a premium, obtained a demise of lands at one-third of their annual value, he was held liable for two-thirds of the land tax; and where such land tax had been redeemed by the landlord, the latter was held entitled to recover such proportion from him by action (*a*).

Provision for the redemption of the land tax has been made by various statutes. If a tenant for years at rack-rent be liable to pay the tax during the demise, the amount, if redeemed by the person beneficially entitled to the rent, is to be payable and recoverable as rent (*b*). But this only applies where the tax is redeemed by his immediate lessor, and not where it has been

(*l*) 16 & 17 Vict. c. 34, s. 36.

(*m*) Per Parke, B., in next-cited case.

(*n*) *Swatman v. Ambler*, 24 L. J. Ex. 185.

(*o*) *Supra*, p. 196.

(*p*) Made perpetual by 38 Geo. 3, c. 60.

(*q*) Sect. 4.

(*r*) Sect. 35.

(*s*) Sect. 17.

(*t*) Sect. 18.

(*u*) *Supra*, pp. 197-8.

(*x*) *Ward v. Const.*, 10 B. & C. 635, at p. 654, per Parke, J.

(*y*) 38 Geo. 3, c. 5, s. 4.

(*z*) Per Bayley, J., in last-cited case.

(*a*) *Ward v. Const.*, *supra*.

(*b*) 42 Geo. 3, c. 116, s. 126.

redeemed by a superior landlord (*c*). And the tenant, as a person "having an estate or interest" in the lands whereon the tax is charged, may redeem the tax himself (*d*).

Sewers rates.—A sewers rate is an assessment in respect of permanent improvements to the land (*e*), and consequently (in the absence of agreement to the contrary (*f*)) falls upon the landlord (*g*), though the tenant usually pays in the first instance (*g*). Every person whose property derives benefit from the works of the Commissioners of Sewers is, under the statutes relating thereto, liable to be rated, even though the benefit be not immediate (*h*). A sewers rate is not a "parliamentary tax," inasmuch as it is not fixed or assessed by Parliament (*i*).

Where a sewer vests, under the Public Health Act (*k*), in the local authority, the mode of levying rates to defray expenses is provided for in the Act (*l*).

Tithe rent-charge.—By 6 & 7 Will. 4, c. 71, a tenant or occupier paying the tithe rent-charge upon the premises demised to him is entitled to deduct the amount from his rent (*m*), *i.e.*, as already explained (*n*), from the instalment which next becomes payable (*o*). But the Act imposes no personal liability on the landlord (*p*); the land only is liable (*q*). By the Tithe Act, 1891 (*r*), however, tithe rent-charge (*s*) is henceforth to be payable by the owner (*t*) of the lands out of which it issues, notwithstanding any contract between him and the occupier, any contract made between them after the passing of the Act (*u*) for its payment by the occupier being void (*x*). This provision, as it has been held, not merely forbids a contract by the occupier to pay the tithe rent-charge directly to the tithe owner, but also prevents him from contracting with his landlord to repay to him, by way of additional rent or otherwise, such sums as the latter may be called upon to disburse for tithe

(*e*) *Faulkner v. Llewellyn*, 9 L. T. 251, 557.

(*d*) See 42 Geo. 3, c. 116, s. 123, and 16 & 17 Vict. c. 117, s. 1.

(*e*) *Smith v. Humble*, 15 C. B. at p. 330, per Maule, J.

(*f*) *Bennett v. Womack*, 7 B. & C. 627.

(*g*) *Palmer v. Earith*, 14 M. & W. 428.

(*h*) *Soady v. Wilson*, 3 A. & E. 248.

(*i*) *Palmer v. Earith*, *supra*. Cf. pp. 196-7, *supra*.

(*k*) 38 & 39 Vict. c. 55, s. 13.

(*l*) See sects. 207 *et seq.*

(*m*) Sect. 80.

(*n*) *Supra*, p. 200.

(*o*) *Dawes v. Thomas*, [1892] 1 Q. B. 414.

(*p*) Sect. 67 (modified by 53 & 54 Vict. c. 33).

(*q*) *Griffinhoofe v. Dauluz*, 4 E. & B. 230; *affd.*, 5 E. & B. 746.

(*r*) 54 Vict. c. 8.

(*s*) Defined in sect. 9.

(*t*) *Id.* Cf. *Peed v. King*, 11 T. L. R. 18.

(*u*) 26th March, 1891.

(*x*) Sect. 1, sub-s. (1).

rent-charge (*y*). But where the occupier is liable for such payment under a contract made before the passing of the Act, though he ceases to be bound by that part of his contract, he is to be liable to pay to the owner such sum as the owner has properly paid on account of the tithe rent-charge which such occupier is liable under his contract to pay, exclusive of any costs incurred or paid by the owner in respect of such tithe rent-charge; and every receipt given for such sum is to state expressly that the sum is paid in respect of that tithe rent-charge (*z*). If the lands out of which the tithe rent-charge issues are occupied by several occupiers who have contracted to pay it, any of such occupiers is to be liable for such proportion only of the sum paid by the owner of the lands as the rateable value of the lands occupied by him bears to the rateable value of the whole (*a*). These sums are recoverable from the occupier by distress, and not otherwise (*b*)—a provision which has been held to be an absolute bar to an action, even if such action be founded on an express promise or contract (*c*).

Apart from the case of liability imposed by a contract made before the Act was passed, tithe rent-charge is, under the Act, made recoverable only through the County Court of the district where the lands or any part of them are situate (*d*). The person entitled may, after it has fallen into arrear for at least three months, apply (*e*) to the County Court, which, after such service (*f*) as may be prescribed on the owner of the lands, and after hearing him if he so desire, may make an order appointing a receiver of the rents and profits of the lands and of any other lands liable to be distrained upon (*g*) for the tithe rent-charge to which the order refers; and where any of such lands are held at one rent together

(*y*) *Ludlow (Lord) v. Pike*, [1904] 1 K. B. 531.

(*z*) Sect. 1, sub-s. (2). This provision (so far at least as the landlord is concerned) seems to displace that of 14 & 15 Vict. c. 25, s. 4, under which, where a tenant liable by the terms of his tenancy to pay tithe quitted without paying it, and the tithe owner gave notice of proceedings to recover it by distress, the landlord or a successor in the tenancy might pay it, and recover it from the tenant by action. This section is now rendered inapplicable by reason of the fact that, as will presently be mentioned, the tithe owner can, in such a case, no longer take "proceedings to recover it by distress."

(*a*) Sect. 1, sub-s. (2).

(*b*) See sect. 1, sub-s. (3).

(*c*) *Church v. Maxsted*, 67 L. J. Q. B. 823. *Sed qu.* An appeal from the decision, after a full argument on the question of law, was eventually dismissed on the preliminary ground that the express contract had not, in fact, been established: C. A. (unreported), Feb. 28th, 1899.

(*d*) Sect. 2, sub-s. (1).

(*e*) Such application may be made by his agent, though not a solicitor: sect. 5, sub-s. (1). As to costs, see sect. 5, sub-s. (2), and Rules (1891), rr. 42, 43. As to notice of application, see rr. 2, 4, 12, 13, 14, and as to notice of opposition, rr. 5, 8, 9, 10, 11.

(*f*) As to service of notices and documents under the Act, see rr. 44—50.

(*g*) Under 6 & 7 Will. 4, c. 71, s. 85.

with lands in another parish, the Court is to apportion the rent according to the rateable value of the lands, in which case payment of the apportioned rent by the occupier to the receiver is, as between the occupier and the owner, to be deemed a payment on account of the total rent payable to the owner (*h*). If it be shown to the Court that the lands are *occupied by the owner*, the Court is to appoint a person who, subject to its direction, is to have the same powers of distress (and failing distress (*i*) of re-entry) as were formerly possessed by the owners of tithe rent-charge for its recovery (*h*).

Lands let at a rent insufficient to enable the receiver to recover from the owner the sum ordered to be recovered may be treated as if the occupier were the owner (after such service on both as may be prescribed, and after hearing them if they so desire), the occupier being entitled—unless liable to pay the tithe rent-charge under a contract made before the passing of the Act (*l*)—to deduct from any sums at any time becoming due from him to his landlord, or to recover from the latter by action, the amount recovered from him in respect of tithe rent-charge and costs, with interest thereon at 4 per cent. (*m*). Where the occupier is liable for tithe rent-charge under any contract made before the passing of the Act (*n*), the owner of the lands must serve notice of such liability on the owner of the tithe rent-charge, or he will not be entitled to recover from the occupier any sum he may have paid on account of the tithe rent-charge (unless he obtain from the Court a certificate, after notice to the occupier of his application (*o*) for the same, that there was sufficient cause for his default, and that the occupier has not been prejudiced); and thereupon before an order is made there must be such service on the occupier, in addition to the owner, as may be prescribed, and a hearing of such occupier if he so desire (*p*).

The Court has the same power over a receiver as it has over receivers in any other case (*q*), but it has no power to order a sale

(*h*) Sect. 2, sub-s. (3). See Rules (1891), rr. 25—28.

(*i*) See Rules (1891), r. 24.

(*k*) Sect. 2, sub-s. (2). See 6 & 7 Will. 4, c. 71, ss. 81, 82, 85. The powers in question are the same as in distresses for rent. See *post*, Book II.

(*l*) See p. 206, *supra*.

(*m*) Sect. 4. See Rules (1891), rr. 29—31.

(*n*) See p. 206, *supra*.

(*o*) It is not necessary on such application to prove that the occupier is, as a matter of fact, liable under a contract made before the passing of the Act, to pay the tithe rent-charge: *Hughes v. Rimmer*, [1893] 2 Q. B. 314.

(*p*) Sect. 2, sub-s. (6). See Rules (1891), rr. 3, 4, 6, 7, 36, 37, 38.

(*q*) See County Court Rules, 1903, O. 13; and Rules (1891), rr. 15—23.

of the lands (*r*). Any sum ordered by the Court to be recovered is to be payable by a trustee in bankruptcy, sheriff, or officer of the Court, who is in possession of the lands, in like manner as if it were tithe rent-charge recoverable under the Tithe Acts (*s*). Nothing in the Act is to impose any personal liability upon any occupier or owner of lands for the payment of any tithe rent-charge (*t*). Any party in an "action or matter" under the Act, aggrieved by the judgment, direction, decision, or order of the County Court judge upon any point of law or equity, or upon the admission or rejection of any evidence, may appeal to the High Court "in such manner and subject to such conditions as may be for the time being provided by the Rules of the Supreme Court (*u*), regulating the procedure on appeals from inferior Courts to the High Court" (*x*). The Act extends to every sum on account of tithe rent-charge which first becomes payable on or after the half-yearly day of payment which occurs next after the passing of the Act, whether such sum accrued before or after that day, and does not extend to sums due on account of tithe rent-charge which were in arrear before the passing of the Act (*y*). A sum on account of tithe rent-charge is not to be recoverable under the Act unless proceedings for such recovery have been commenced before the expiration of two years from the date at which it became payable (*z*). Nothing in the Act is to alter the priority of any tithe rent-charge in relation to any other charge or incumbrance upon any lands (*a*). Any enactment in the Tithe Acts or in the Extraordinary Tithe Redemption Act, 1886 (*b*), directing any expenses, rent-charge, or other sums to be recovered as tithe rent-charge, is, as respects any sum becoming due after the passing of this Act, to be construed to refer to the recovery of tithe rent-charge under this Act, save that the owner of the lands is not to be entitled to obtain any remission under this Act (*c*).

The Act also contains provisions as to the rating of the owner of a tithe rent-charge (*d*), and as to the remission of tithe rent-charge when the County Court is satisfied that if the sum claimed were

(*r*) Sect. 2, sub-s. (4).

(*s*) Sect. 2, sub-s. (5).

(*t*) Sect. 2, sub-s. (9). See *id.*, as to powers of imprisonment.

(*u*) See R. S. C. 1883, O. 59; 57 & 58 Vict. c. 16, s. 1 (5).

(*x*) Sect. 7.

(*y*) Sect. 10, sub-s. (1). See *id.*, as to lands of railway companies.

(*z*) Sect. 10, sub-s. (2).

(*a*) Sect. 10, sub-s. (3).

(*b*) 49 & 50 Vict. c. 54, *infra*.

(*c*) Sect. 10, sub-s. (4). This applies to redemption money: *R. v. Paterson*, [1895] 1 Q. B. 31.

(*d*) Sect. 6. See Rules (1891), rr. 39—41; *Roberts v. Potts*, [1894] 1 Q. B. 213 (reported as *Jones v. Potts*, 63 L. J. Q. B. 381).

paid, the total amount paid on account of the tithe rent-charge for the period of twelve months next preceding the day on which the sum claimed became payable would exceed two-thirds of the annual value of the lands (*e*). The Act likewise empowers the making of rules to regulate the procedure, practice, and costs under it (*f*), and such rules have accordingly been made (*g*). It further directs that the fees payable on proceedings under it shall not exceed those set forth in the schedule to the Act (*h*), while those incidental to any distress under the Act shall be the same as those payable under the Law of Distress Amendment Act (*i*).

The *Extraordinary Tithe Rent-charge* on hop grounds, orchards, fruit plantations, and market gardens, which was authorized by 6 & 7 Will. 4, c. 71 (*k*), and by 2 & 3 Vict. c. 62 (*l*), was by a later statute (*m*) abolished, so far as relates to grounds newly cultivated as orchards, &c., after the passing of the last-mentioned Act (*n*). The Act substitutes a new rent-charge (*o*), which is payable by the landlord—any agreement to the contrary notwithstanding (*p*)—unless the tenant has before the passing of the Act contracted to pay the extraordinary charge (or any part thereof) which it replaces, in which case he will be liable for the new rent-charge while his tenancy subsists (*q*). For the purposes of this provision a yearly tenancy or a tenancy at will is deemed to determine at the time when it would by law become determinable, if notice to determine it were given at the date of the passing of the Act (*r*). The rent-charge is exempt from land tax (*s*).

II. Tenant's taxes.—These may all be made the subject of agreement between the parties; but in the absence of such an agreement they fall upon the tenant. The principal ones are poor rates, assessed taxes, county, borough, and highway rates, general

(*e*) Sect. 8. See Rules (1891), rr. 32—35.

(*f*) Sect. 2, sub-s. (7); sect. 3.

(*g*) These rules, called the Tithe Rent-charge Recovery Rules (1891), have been shortly referred to under this head as "Rules (1891)." As to the effect of non-compliance with them, see r. 55; as to who may exercise the powers conferred by them, see r. 56; as to procedure in matters not specially provided for by them, see r. 57.

(*h*) Sect. 2, sub-s. (8).

(*i*) 51 & 52 Vict. c. 21; *post*, p. 552.

(*k*) Sect. 42.

(*l*) Sect. 26.

(*m*) 49 & 50 Vict. c. 54, s. 1: now repealed, with the usual saving, by Stat. Law Rev. Act, 1898 (61 & 62 Vict. c. 22).

(*n*) 25th June, 1886.

(*o*) For details the Act itself must be consulted. See, too, *Simmonds v. Heath*, [1894] 1 Q. B. 29.

(*p*) Sect. 7, sub-s. (3).

(*q*) Sub-s. (1).

(*r*) Sub-s. (2). See *post*, pp. 596, 606.

(*s*) *Carr v. Fowler*, [1893] 1 Q. B. 251.

district rates and improvement rates (under the Public Health Act), and water and gas rates.

It should be added that by the Agricultural Rates Act, 1896 (*t*), during a period now extended (*u*) to 31st March, 1910, the occupier (including (*v*) the owner where he is rated in place of the occupier (*x*)) of agricultural land (*v*) is to be liable to pay one-half only of the rate in the pound payable in respect of buildings and other hereditaments (*y*). The Act applies to every rate made during its continuance, the proceeds of which are applicable to public local purposes, and which is leviable on the basis of an assessment in respect of the yearly value of property; and such rate includes any sum which, though obtained in the first instance by a precept, certificate, or other instrument requiring payment from some authority or officer, is or can be ultimately raised out of a rate as just defined (*v*). But it does not apply to a rate which the occupier of agricultural land is liable, as compared with the occupier of buildings or other hereditaments, to be assessed to or to pay in the proportion of one-half or less than one-half (*z*); or which is assessed under any commission of sewers, or in respect of any drainage, wall, embankment, or other work for the benefit of the land (*y*). It has been decided that the terms "land" and "buildings" in this Act are mutually exclusive of each other, so that glass-houses in a market garden, if buildings, must be rated as such and not as agricultural land (*a*).

Poor rates.—The poor rate is not a tax on the land, but a personal charge on the occupier in respect of the land (*b*). The statute 43 Eliz. c. 2, by which it was first levied, imposes it in terms upon "every occupier" of lands and houses (*c*); and it is immaterial what interest he has in the lands, whether he holds as tenant at will or by any other tenure (*d*). A lessee, however, who underlets is not liable for poor rates, and this even though the undertenants are excused on the ground of poverty (*e*). The statute of Elizabeth, in imposing the rate upon the occupiers of houses, does not intend merely the occupiers of a whole house (*f*); so that a person may be assessed to the poor rate for part of a

(*t*) 59 & 60 Vict. c. 16.

(*u*) See 1 Edw. 7, c. 13, s. 1, and 5 Edw. 7, c. 8, s. 1.

(*r*) 59 & 60 Vict. c. 16, s. 9.

(*x*) See *infra*, pp. 211, 212.

(*y*) Sect. 1.

(*z*) See, *e.g.*, *infra*, p. 213.

(*a*) *Smith v. Richmond*, [1899] A.C. 448.

(*b*) *Rowls v. Gells*, Cowp. 451, per Lord Mansfield, C. J.

(*c*) Sect. 1.

(*d*) *Bute (Lord) v. Grindall*, 1 T. R. 338, per Buller, J.

(*e*) *R. v. Hull Dock Co.*, 3 B. & C. 516.

(*f*) Per Patteson, J., in next-cited case.

house (*g*), and should be so assessed if there be a separate and exclusive occupation by him of such part, though there be no structural severance of that part from the rest of the house (*h*). A lodger, however, is not rateable though he has the sole right to the use of certain rooms in a house, if the person who lets the lodgings (as in the ordinary case) still retains the possession (*i*). And where a house is wholly let out in apartments or lodgings not separately rated, the owner (and not the occupier) is to be rated in respect thereof (*k*). For the purposes of the poor rate the owner of a house let ready-furnished is deemed to be the occupier (*l*). And if the owner of a house occupy part of it he is liable to be rated for the whole, unless there be a distinct occupation of the rest by some other person (*m*).

To the general rule, moreover, that poor rates fall on the occupier, an exception has been established by the Poor Rate Assessment Act, 1869 (32 & 33 Vict. c. 41), which provides (*n*) that the occupier of a hereditament let to him for a term not exceeding three months may, upon payment of the rate, deduct the amount from his rent. A letting is for a term "not exceeding three months" within the above enactment so long as it does not necessarily last more than that period; so that an ordinary weekly tenancy falls within it (*o*). The Act contains further provisions for rating (subject to the control of the vestry (*p*) and to the conditions prescribed by the Act (*q*)) owners instead of occupiers where the rateable value of the premises does not exceed 8*l.* (*r*); and where the owner is liable for the rate, upon his default the occupier—from whom also payment of the rate may be exacted (*s*)—may pay and deduct it from his rent (*t*). But the owner, under these provisions, can be rated instead of the occupier, only so long as the rateable value of the premises does not exceed the specified limit (*u*). The Act also provides that tenants ceasing to occupy

(*g*) *B. v. Ponsonby*, 3 Q. B. 14.

(*h*) *Allchurch v. Hendon Union*, [1891] 2 Q. B. 436.

(*i*) *Watkins v. Overseers of Milton*, L. R. 3 Q. B. at p. 357, per Blackburn, J. See *ante*, p. 8.

(*k*) 30 & 31 Vict. c. 102, s. 7. See on this section, *Bradley v. Baylis*, 8 Q. B. Div. 195.

(*l*) *B. v. St. Pancras Assessment Committee*, 2 Q. B. D. at p. 588, per Lush, J. (reported as *Willing v. St. Pancras Assessment Committee*, 37 L. T. 126); *Staunton v. Powell*, Ir. R. 1 C. L. 182.

(*m*) *R. v. St. Mary-the-Less, Durham*, 4 T. R. 477.

(*n*) Sect. 1.

(*o*) *Hammond v. Farrow*, [1904] 2 K. B. 332.

(*p*) See now 56 & 57 Vict. c. 73, s. 34.

(*q*) Sects. 3, 4.

(*r*) This limit is higher in certain populous towns specified in sect. 3 of the Act; see *ante*, p. 149.

(*s*) Sect. 12.

(*t*) Sect. 8.

(*u*) *Norwood (Overseers of) v. Salter*, [1892] 2 Q. B. 118.

the premises during the period for which the rate is made shall only be liable in proportion to the time of their occupation, and that incoming tenants shall be also liable only for the time they occupy during that period (*x*). By an earlier Act (*y*), it has been provided that the vestry (*z*) of a parish may (*a*), by resolution, order that the owners (being the immediate lessors of the actual occupiers) of "houses, apartments, or dwellings," let at a rent not exceeding 20*l.*, nor less than 6*l.*, by the year, for any less term than one year, or on any agreement by which the rent is reserved or made payable at any shorter period than three months, shall be assessed to the poor rates instead of the occupiers. It may be observed that the 20*l.* limit in the above provision applies to the latter as well as to the former of its two clauses (*b*), but it seems doubtful whether the provision is still in force, and whether it has not, at all events as regards premises situate in parliamentary boroughs (*c*), been impliedly repealed by the provisions (*d*) already alluded to (*e*).

The Rating Act, 1874 (37 & 38 Vict. c. 54), extends (*f*) the operation of the Poor Rate Acts to woods and plantations, to rights of sporting when severed from the occupation of land (*g*), and to mines of every kind (*h*). The tenant in these cases may become entitled to deductions, as to which the Act itself must be consulted (*i*); and, where he is so entitled, any payment so authorized to be deducted operates as a discharge to him for an equivalent amount of rent, or may be recovered as an ordinary debt from the person to whom the rent may be payable (*k*).

Assessed taxes.—Assessed taxes, which consist of duties on male servants, horses, carriages, dogs, armorial bearings, game certificates, &c., naturally fall upon the tenant (in the absence of express stipulation to the contrary), inasmuch as he enjoys the use of the things so taxed. So the inhabited house duties, which are deemed to be "duties of assessed taxes" (*l*), have likewise to be borne by the occupier.

(*x*) Sect. 16. See, on this section, *R. v. Tempest*, 14 T. L. R. 199.

(*y*) 59 Geo. 3, c. 12.

(*z*) See now 56 & 57 Vict. c. 73, ss. 6 (1), 19.

(*a*) Sect. 19.

(*b*) *West Ham (Overseers of) v. Iles*, 8 App. Ca. 386.

(*c*) See 30 & 31 Vict. c. 102, s. 7.

(*d*) 32 & 33 Vict. c. 41, ss. 3, 4.

(*e*) *West Ham (Churchwardens of) v.*

Fourth, &c., Building Society, [1892] 1 Q. B. 654.

(*f*) Sect. 3.

(*g*) See *Alton Urban Council v. Spicer*, [1904] 1 K. B. 678, cited *infra*, p. 213.

(*h*) Under the Act of Elizabeth only coal mines were rateable.

(*i*) Sects. 5, 6, 8.

(*k*) Sect. 9.

(*l*) 14 & 15 Vict. c. 36, s. 2.

County, borough, and highway rates.—"County rates" are leviable under 15 & 16 Vict. c. 81 (*m*). The county rate is not a parliamentary tax (*n*), but is a parochial tax, being paid out of the poor rate (*o*).

"Borough rates" are leviable, under 45 & 46 Vict. c. 50 (*p*), in those cases where a borough fund is insufficient for the purposes to which it is applicable.

"Highway rates" are leviable under 5 & 6 Will. 4, c. 50 (*q*), and (as regards highways within the district of an urban sanitary authority) under 38 & 39 Vict. c. 55 (*r*).

All these assessments, in the absence of express agreement to the contrary, fall upon the tenant.

General district rates and Improvement rates.—These rates, which are assessed (under the Public Health Act) on the full net annual value of the premises—except that they are levied only on one-fourth of such value in the case (amongst others) of land used as arable, meadow, or pasture ground only, or as woodlands (*s*), market gardens (*t*), or nursery grounds, or of land covered with water (*u*)—are also levied on the occupier (*x*); though the lessee of sporting rights over such land, when those rights are let apart from the land, is not an occupier of it within the meaning of the above exception, but is liable (under a statute already noticed) (*y*) for the full amount of the rate (*z*). But where the rateable value does not exceed 10*l.*, or where the letting is to weekly or monthly tenants, or in separate apartments, or where the rents become payable or are collected at any shorter period than quarterly, the urban authority (*a*) have the option of rating the owner instead of the occupier—so that for this provision to apply there must be an occupier (*b*),—but only on such reduced estimate as the authority

(*m*) Sect. 21.

(*n*) *Palmer v. Earith*, 14 M. & W. at p. 430, per Alderson, B. Cf. *supra*, p. 196.

(*o*) *R. v. Aylesbury*, 9 Q. B. 261.

(*p*) Sect. 144.

(*q*) Sect. 27.

(*r*) Sect. 216. In this case they form part of the general district rate. See under next head.

(*s*) Including orchards (53 & 54 Vict. c. 17) and allotments (54 & 55 Vict. c. 33).

(*t*) Land covered with glass-houses built for the purpose of growing produce for sale is within this exception:

Purser v. Local Board for Worthing, 18 Q. B. Div. 818.

(*u*) See *Hampton Urban Council v. Southwark, &c., Water Co.*, [1900] A. C. 3.

(*x*) 38 & 39 Vict. c. 55, s. 211.

(*y*) 37 & 38 Vict. c. 54, s. 3: *supra*, p. 212.

(*z*) *Alton Urban Council v. Spicer*, [1904] 1 K. B. 678.

(*a*) In rural districts a different mode of assessment prevails: see sects. 220 *et seq.*

(*b*) *R. v. Barclay*, 8 Q. B. Div. 486, per Lord Coleridge, C. J.

deem reasonable of the net annual value (not being less than two-thirds and more than four-fifths thereof (*e*)), and not so as to alter or affect any lease or agreement entered into between landlord and tenant of the premises (*d*). The rate, too, is not to be charged on any person in respect of premises unoccupied at the time of making the rate; and if they afterwards come to be occupied during any part of the time for which the rate was made, and before it has been fully paid, the incoming tenant becomes liable, but only proportionately to the time of his occupation (*e*). So an outgoing tenant, or a person who (in the case where the rate falls on the owner) ceases to be owner, is liable for his share of the rate, also in proportion only to the time he continues to be such occupier or owner (*f*). A general district rate is not a "parochial" rate (*g*).

The occupier is also liable under the Public Health Act (*h*) to "*private improvement rates*." Three-fourths, however, of these, or (where he holds at a rent less than the rack-rent) such proportion of three-fourths as his rent bears to the rack-rent, he is entitled to deduct from his rent (*i*). When the premises become unoccupied during the period for which the rate is made, and before it is fully paid off, it falls on the owner (*k*).

Other improvement rates, *e.g.*, in parishes maintaining their own poor (*l*), and in the metropolis (*m*), may also be made incident to the occupation of premises.

A covenant by the tenant to pay rent clear of all deductions for (*inter alia*) metropolitan and local improvement rates (which he expressly agrees to pay) will not disentitle him to deduct from his rent (*n*) the cost of constructing a drain from the demised premises into the common sewer, which cost has been incurred by a public authority and recovered by them from him; for the party primarily liable to the expense is the landlord (*o*), and the rates specified in such a covenant are rates charged against all the persons resident

(*e*) Sect. 211.

(*d*) Sect. 226. The marginal note of the section and the *dictum* of Parke, B., in *In re Knight*, 1 Exch. 802 (reported as *Gwynne v. Knight*, 17 L. J. Ex. 168), seem to point only to agreements entered into before the passing of the Act as being within the section; but it is submitted that the true meaning is that parties may always contract themselves out of the Act.

(*e*) Sect. 211, sub-s. (2). See *Gage v. Wren*, 87 L. T. 271.

(*f*) Sect. 211, sub-s. (3).

(*g*) *Richards v. Overseers of Kidderminster*, [1896] 2 Ch. 212.

(*h*) Sect. 213. This section also applies to rural districts (see sect. 232).

(*i*) Sect. 214.

(*k*) Sect. 213.

(*l*) Under 23 & 24 Vict. c. 30, s. 4.

(*m*) Under 25 & 26 Vict. c. 102, s. 30.

(*n*) Under 25 & 26 Vict. c. 102, s. 96.

(*o*) Under 18 & 19 Vict. c. 120, s. 73.

in a district, and do not apply to a charge made on one person for the sanitary improvement of his house (*p*).

Water and gas rates.—Both these charges fall on the tenant in the absence of express stipulation to the contrary.

With regard to water rates, the only exception seems to be that in the case of dwelling-houses, or parts of dwelling-houses, occupied as separate tenements, where the annual value of such house or tenement does not exceed 10*l.*, the owner is liable for payment of the water rate instead of the occupier (*q*). (But such rate may be recovered, in the first instance, from the tenant after he has received notice to pay it out of the rent then due or that may become due: no greater sum than the rent due being recoverable from him, and he being entitled to deduct the amount paid from his rent (*r*).) This, however, does not apply, unless by special agreement, to an occupation under a lease or agreement made prior to the passing of the special Act authorizing the construction of waterworks in any particular case, and incorporating the general Act (*s*). And when "communication pipes and other necessary works" have been laid down, on the request either of the owner (*t*) or of the occupier (*u*) of a house not exceeding 10*l.* in annual value, for the supply of such house with water, the rent for such pipes and works (which is to be charged in addition to the water rate (*x*)), upon being paid by the occupier, may be deducted by him from any rent from time to time due from him to such owner (*y*).

With regard to gas rates, it may be mentioned that incoming tenants are not liable for arrears of their predecessors, unless by special arrangement with them to that effect (*z*).

(*p*) *Home and Colonial Stores v. Todd*,
63 L. T. 829.

(*q*) 10 & 11 Vict. c. 17, s. 72.

(*r*) 50 & 51 Vict. c. 21, s. 4.

(*s*) 10 & 11 Vict. c. 17, s. 73.

(*t*) *Id.*, s. 44.

(*u*) 38 & 39 Vict. c. 55, s. 57.

(*x*) 10 & 11 Vict. c. 17, s. 44.

(*y*) 38 & 39 Vict. c. 55, s. 57.

(*z*) 34 & 35 Vict. c. 41, s. 39. See
In re Smith, [1893] 1 Q. B. 323; *Pater-*
son v. Gas Light, &c., Co., [1896] 2 Ch.
476; *Griffiths v. Ilford Gas, &c., Co.*, 63
J. P. 297; *Cannon Brewery Co. v. Gas*
Light, &c., Co., [1904] A. C. 331.

DIV. VI.—COVENANTS—(continued).

SECT. 3.—COVENANT TO REPAIR.

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Nearly all leases contain a covenant to repair (*a*) on the part of the lessee (*b*). Occasionally, however, the liability in this respect is imposed by the terms of the lease or agreement upon the lessor (*c*); and not infrequently the lessee's liability to repair is made to depend upon the previous execution of repairs by the lessor (*d*), or upon the performance by him of some other condition. It may be added that an action for damages for a breach of covenant to repair is an action brought to enforce a "contract, obligation, or liability affecting land," so as to entitle the Court (*e*) to allow service of the writ out of the jurisdiction (*f*).

Conditions precedent.—The question whether an undertaking by the lessor forms in law a condition precedent to the liability of the lessee depends on the language used in each particular case, and has in some instances given rise to difficulty (*g*). Covenants, for instance, by the tenant to keep premises in repair "from and after" their repair by the landlord (*h*), or "the same being first put" into repair by him (*i*), or a covenant by the lessee to expend a certain sum in repairs and improvements under the direction of a surveyor to be named by the lessor (*k*), are dependent covenants (*l*), and

(*a*) As to liability in its absence, see *ante*, p. 150.

(*b*) A form of statement of claim in an action for breach of this covenant will be found in the R. S. C. 1883, App. C., s. V., No. 9. The writ may be indorsed as follows: "The plaintiff's claim is for damages for breach of contract to keep a house in repair:" *id.*, App. A., pt. III., s. 4. As to trial without pleadings, see *ante*, p. 162.

(*c*) See p. 235, *infra*.

(*d*) *Counter v. Macpherson*, 5 Moo. P. C. 83.

(*e*) Under R. S. C. 1883, O. 11, r. 1 (*b*).

(*f*) *Tassell v. Hallen*, [1892] 1 Q. B.

321. As to leave required, see *post*, p. 773.

(*g*) See the question discussed generally, pp. 133, 134, *ante*.

(*h*) *Slater v. Stone*, Cro. Jac. 645.

(*i*) *Neale v. Batcliff*, 15 Q. B. 916; *Coward v. Gregory*, L. R. 2 C. P. 153.

(*k*) *Coombe v. Greene*, 11 M. & W. 480; *Hunt v. Bishop*, 8 Exch. 675. The wording of the covenant in *Jones v. Cannock*, 5 Exch. 713 (affd. 3 H. L. C. 700), where specified work to be done by the lessor was agreed "to be left to the superintendence" of certain persons, makes it easily distinguishable.

(*l*) See p. 133, *ante*.

cannot be enforced until the performance of the conditions upon which they depend. Moreover (in the former case) the whole premises must be put into repair before the tenant can be called upon to repair any part of them (*m*). So a covenant to repair, the lessor finding timber for the purpose, is conditional on the finding of the timber (*n*), though the condition is sufficiently performed by the lessor being ready and willing to find it, as it is not reasonable that it should be cut before the lessee requires it for the repairs (*o*). On the other hand, a covenant to repair, "having or taking upon the premises" sufficient materials, is in its terms absolute, the effect of the added clause being only to give the lessee a licence to take the materials without making him liable for waste (*p*). In the same way, where a tenant agreed to keep farm buildings in repair, and the landlord in a subsequent part of the agreement undertook to find, upon notice from him, materials for such repairs, it was held that the tenant's obligation to repair was not conditional on the landlord finding the materials (*q*). So where a lessee covenanted to repair a house before a given date (certain materials being found by the lessor towards the repair), and afterwards to keep it in repair during the term, it was held that finding the materials was not a condition precedent to the covenant to keep in repair, but only to the covenant to put in repair by the time specified (*r*). And where a lessor agreed to allow out of rent a certain sum which should be expended by the lessee in repairs to be executed with his approval and in a substantial manner, it was held that such approval was not a condition precedent to the claim for repayment by the lessee (*s*).

To the covenant by the lessee to repair generally is often added a covenant to repair within a certain time (usually three months) after notice from the lessor. When this is the case these are independent covenants (*t*), so that even though the notice may have been given under the latter, the lessee's liability in covenant under the former may still be enforced before the expiration of such notice (*u*). (But where a notice to repair has been given and the lessee makes an offer, upon which negotiations

(*m*) *Neale v. Ratcliff*, *supra*.

(*n*) *Thomas v. Cadwallader*, Willes, 496.

(*o*) *Martyn v. Clue*, 18 Q. B. 661.

(*p*) *Dean of Bristol v. Jones*, 1 E. & E. 484.

(*q*) *Tucker v. Linger*, 21 Ch. D. 18, per Kay, J.

(*r*) *Mucklestone v. Thomas*, Willes, 146.

(*s*) *Dallman v. King*, 4 Bing. N. C. 105.

(*t*) *Baylis v. Le Gros*, 4 C. B. N. S. 537, and other cases cited *post*, p. 654.

(*u*) *Doe v. Meuz*, 4 B. & C. 606, per Bayley, J.

ensue, to sell his interest in the premises, the effect is to suspend the notice until the negotiations come to an end (*x*.) A covenant, however, to repair at all times when occasion should require during the term, "and at furthest within three months after notice," is a single covenant, the latter part of which qualifies the former (*y*). On the other hand, a covenant to repair during the term on three months' notice and to leave in repair at the end of the term is divisible, and notice is not necessary to sustain an action for non-repair at the end of the term (*z*). So where a lessee covenanted to complete certain buildings within a given time and also to keep them in repair during the term, it was held that the covenants were distinct, and that the latter (as well of course as the former) was broken, though the buildings never were completed at all (*a*).

Duration of liability.—The tenant's liability under the general covenant to repair and keep in repair extends over the whole term, and—unlike a covenant merely to *leave* in repair, on which no action will lie until the term ends (*b*)—a breach is committed upon which an action may be brought if the premises are at any time during the term out of repair (*c*). Such a breach—unlike that of a covenant to *put* in repair, which can only be broken once for all (*d*)—is a continuing breach (*e*), and the recovery of judgment against him on one occasion (though it may go in mitigation of damages) is consequently no bar to an action upon the same covenant on another (*f*). It follows, too, that the landlord's right to recover for a breach is not in general affected by the Statute of Limitations; nor (as it has been held) is the result different where the original breach has consisted in the definite act of pulling down and destroying the premises to which the covenant relates (*g*). After the end of the term it is presumed that the right of action will endure for twenty or six years, according as the demise is (*h*)

(*x*) *Hughes v. Metropolitan Ry. Co.*, 2 App. Ca. 439. Compare *Doe v. Brindley*, 4 B. & Ad. 84, cited *post*, p. 655.

(*y*) *Horsefall v. Testar*, 7 Taunt. 385.

(*z*) *Harfet v. Butcher*, Cro. Jac. 644; *Wood v. Day*, 1 Moore, 389.

(*a*) *Bennett v. Herring*, 3 C. B. N. S. 370; *Jacob v. Down*, [1900] 2 Ch. 156, cited *infra*, p. 219.

(*b*) Platt on Covenants, 289. As to effect of subsequent promise by lessor to give time for execution of repairs, see *Bayley v. Homan*, 3 Bing. N. C. 915.

(*c*) *Luzmore v. Robson*, 1 B. & A. 584.

(*d*) Per Erle, C. J., and Willes, J., in *Coward v. Gregory*, *infra*. See, as to continuing covenants, *Morris v. Kennedy*, [1896] 2 I. R. 247, cited *post*, p. 654.

(*e*) *Spoor v. Green*, L. R. 9 Ex. 99, per Bramwell, B.

(*f*) *Coward v. Gregory*, L. R. 2 C. P. 153. The covenant here was by the lessor, but the principle is the same.

(*g*) *Maddock v. Mallet*, 12 Ir. Com. L. Rep. 173 (Ex. Ch., reversing judgment of Q. B.).

(*h*) 3 & 4 Will. 4, c. 42, s. 3.

or is not (*i*) under seal. Although the mere non-enforcement of a covenant to repair does not afford evidence of a release of such covenant, long-continued acquiescence in a mode of laying out the demised lands which renders the performance of the covenant in such conditions impossible will, if knowledge of it by the lessor be established, furnish sufficient ground for the implication that such release has been given (*k*).

Where the tenant holds over after the determination of his term upon an implied tenancy from year to year (*l*), his liability upon the covenant to repair still continues (*m*); but the covenant cannot be enlarged by such an extension of the term so as to compel the tenant to do certain things as repairs (*n*) which otherwise would not have been within its scope (*o*).

In a covenant to complete unfinished buildings within a certain time, and also to keep them in repair during the term, the undertaking as to repair applies, as has just been seen, though the premises be unfinished (*p*). For the covenant to keep premises in repair imposes an obligation to do everything which may be necessary for that purpose (*q*). Hence, where the lessees of a piece of land covenanted to erect certain buildings thereupon within a specified time, and at all times during the term to keep the buildings "so to be erected as aforesaid" in repair, it was held that the repairing (as well as the building) covenant imposed an obligation to erect the buildings, and that of *that* covenant (*r*) the breach was continuing (*s*).

As with other express covenants (*t*), the liability of the lessee during the whole term and at the end of it under an express covenant to repair is unaffected by assignment (*u*). And even where he parts with his interest in the demised premises under circumstances which free him from liability upon his covenants, as where he receives notice to treat from a public company under their

(*i*) See *Leigh v. Thornton*, 1 B. & A. 625.

(*k*) *Gibson v. Payne*, 22 T. L. R. 54 (affd., C. A., 23 T. L. R. 250). The lessee under a building scheme in this case had covenanted to erect on the demised premises a certain building within a specified time and keep it in repair, but the whole scheme was afterwards changed, and no building was erected. Cf. *Gibson v. Doeg*, 2 H. & N. 615, cited *post*, pp. 258, 271.

(*l*) See *post*, p. 394.

(*m*) *Ecclesiastical Commissioners v. Merral*, L. R. 4 Ex. 162; *post*, pp. 396,

397. And cp. *Brown v. Trumper*, 26 Beav. 11.

(*n*) *Infra*, pp. 222—228.

(*o*) *Crawford v. Newton*, 36 W. R. 54, per Cave, J.

(*p*) *Bennett v. Herring*, *supra*.

(*q*) Per Stirling, J., in next-cited case.

(*r*) See, as to the building covenant in itself, *post*, p. 654.

(*s*) *Jacob v. Down*, [1900] 2 Ch. 156.

(*t*) *Ante*, p. 162.

(*u*) *Brett v. Cumberland*, Cro. Jac. 521; *Matures v. Westwood*, Cro. Eliz. 617; notes to *Spencer's case*, 1 Sm. L. C. at p. 73 (11th ed.).

compulsory powers of purchase, his liability upon the covenant to repair lasts until the actual date of assignment (*x*).

The assignee's liability upon the covenant to repair, as between himself and the lessor and lessee respectively, will be considered hereafter (*y*).

What property included.—The general covenant to repair *primâ facie* applies to everything which is the subject of the demise (*z*), even though not expressly mentioned in it by name (*a*). It extends also to all buildings erected on the demised premises during the term (*b*), whether this be expressly stipulated (*c*) or not (*d*). But if the covenant be to repair "the demised buildings" it is otherwise (*e*), unless the new buildings are attached to, and made part of, the old (*f*). Hence where, in the lease of a messuage and land, it was provided that the lessees should erect specified buildings on the land, and that they should keep both these and the original messuages at all times in repair and so yield up the "demised premises" at the end of the term, and the lessees after constructing the specified buildings erected also a factory upon the land, it was held that (whatever might be their duty as to repair at the end of the term) in an action brought during its currency they were not liable for repairs to the factory; and that the presence in the lease of a covenant to permit the lessors to enter upon "the said demised premises or any part thereof" in order to examine their condition and give notice of any defects of repair, which the lessees undertook within a specified time to remedy, made no difference (*g*). Where, it may be added, a lessee has covenanted to lay out a specified sum in erecting new, in place of existing, buildings on the premises, the covenant to repair may be construed to apply to the new buildings only (*h*).

The covenant likewise extends to all fixtures in the nature of buildings, provided they are attached to the demised land (*i*), and not merely resting thereon (*k*), even if such fixtures be

(*x*) *Mills v. East London Union*, L. R. 8 C. P. 79.

(*y*) See *post*, pp. 428, 431, 432.

(*z*) *Openshaw v. Eans*, 50 L. T. 156.

(*a*) *Pyot v. St. John (Lady)*, Cro. Jac. 329.

(*b*) *Douse v. Earle*, 3 Lev. 264; Bac. Ab. Covenant (F.).

(*c*) *Hudson v. Williams*, 39 L. T. 632; *White v. Wakley*, 26 Beav. 17 (buildings erected by tenant on wastes of manor).

(*d*) *Brown v. Blunden*, Skin. 121; *Sunderland v. Newton*, 3 Sim. 450.

(*e*) *Doe v. Rowlands*, 9 C. & P. at p. 740, per Coleridge, J.; *Cornish v. Cleife*, 3 H. & C. 446, per Channell, B.

(*f*) *Cornish v. Cleife*, *supra*, per Bramwell, B.

(*g*) *Smith v. Mills*, 16 T. L. R. 59.

(*h*) *Lant v. Norris*, 1 Burr. 287.

(*i*) *Penry v. Brown*, 2 Stark. 403.

(*k*) *Naylor v. Collinge*, 1 Taunt. 19. For if only so resting they are not really fixtures at all: see pp. 692, 693, *post*.

erected by the tenant during the term for the purposes of his trade (*l*), or if erected by him under a prior lease, unless it clearly appear that it was the intention of the parties to take them out of the operation of the covenant (*m*). Hence, if the covenant be to repair and *yield up in repair*, in none of these cases can such fixtures be removed at the end of the term (*n*). But even if the tenant has expressly covenanted to repair and uphold the demised premises and to deliver them up at the end of the term, together with all things affixed thereto, the removal and sale by him of fixtures which he does not immediately replace, but which can be replaced before the end of the term, is not *in itself* a breach of the covenant (*o*).

In some leases a covenant is found imposing an obligation on the lessee to repair and keep in repair roads adjoining the demised premises, or to pay a certain proportion of the necessary expenses; but such a covenant only entitles the lessor to claim in respect of reasonable repairs to such roads, and not, for instance, in respect of those by which the nature of their formation is wholly changed (*p*). In construing a covenant of this kind regard must always be had to the standard of the condition of the roads at the time when it is entered into (*q*).

Consequences in case of fire.—Under a covenant to repair and keep in repair (without more),—if the premises should be destroyed by fire (*r*), or other extraordinary accident, the tenant would be bound to rebuild them at his own cost (*s*), and this even if the landlord have insured them and received the insurance money (*t*); nor is the tenant's liability upon such destruction happening confined to the amount to which by another covenant he may have agreed to insure the premises (*u*). But where a tenant agreed to

(*l*) *Nay'or v. Collinge*, *supra*.

(*m*) *Thresher v. East London Waterworks Co.*, 2 B. & C. 608.

(*n*) See *post*, p. 705.

(*o*) *Doe v. Davis*, 15 Jur. 155. The jury, however, at the trial in this case had expressly found both that the fixtures in question were removable and might be restored before the end of the term, and that they had not been removed in such a way as to amount to non-repair. The action was one of ejectment, and the difficulty would now be surmounted by the Conv. Act. See *post*, p. 657.

(*p*) *London (Mayor of) v. Barnes*, 12 T. L. R. 135.

(*q*) *Scott v. Brown*, 69 J. P. 89.

(*r*) As to the tenant's liability in the absence of a covenant to repair, see *ante*, p. 150.

(*s*) *Chesterfield v. Bolton*, 2 Comyn, 627; *Bullock v. Dommitt*, 6 T. R. 650; *Pym v. Blackburn*, 3 Ves. 34; *Olark v. Glasgow Assurance Co.*, 1 Macq. 668, per Lord Cranworth, L. C.

(*t*) *Leeds v. Choetham*, 1 Sim. 146; followed in *Lofft v. Dennis*, 1 E. & E. 474. See this matter discussed, p. 241, *post*.

(*u*) *Digby v. Atkinson*, 4 Camp. 275. As to the tenant's liability for rent under such circumstances, see *ante*, pp. 170, 171.

maintain the premises in as good a state as they would be in when certain repairs agreed to be done by him were executed, it was held that his liability, upon their destruction by fire, was limited to what it would cost to put them into the same condition as that in which he had taken them if he had done the repairs (*x*). And at the present day casualties by fire and other accidental causes are, as a rule, expressly excepted in the repairing covenants of leases; and when this is the case no such liability as above mentioned can be incurred by the lessee (*y*). An exception, however, of this kind will not include under inevitable accidents the consequence of the tenant's acts themselves; thus the fall of premises from his overloading one of the floors is not within an exception of damage by "fire, storm, tempest, or other inevitable accident" in his covenant to repair (*z*). Even where the tenant is free from liability there is no obligation on the landlord, without express stipulation to that effect, to repair or reinstate the premises (*a*); and where such stipulation exists (*b*) it extends only to the premises as actually demised by him, and will not comprise additions to them made by the tenant (*c*).

The fact (it may be added) that the tenant has been evicted from part of the demised premises does not exonerate him from liability upon his covenant to repair (*d*), even though such eviction may have been by the landlord himself (*e*), and even though he relinquish possession of the remainder of the premises (*f*).

Nature and amount of repairs.—These depend primarily on the wording of the covenants in each particular case, as they are sometimes framed in such a way as to impose greater obligations (*e.g.*, with regard to painting) (*g*) on the tenant than he would be under by the terms of the ordinary or general covenant. But, as regards the general covenant itself, the form in which it may be expressed is not at the present day regarded as very material; and little difference, for instance, is drawn between the effect of a covenant to uphold, repair, and maintain premises (even where many other words of a similar kind are added), and that of an obligation to keep them

(*x*) *Yates v. Dunster*, 11 Exch. 15.

(*y*) See *Manchester Bonded, &c., Co. v. Carr*, 5 C. P. D. 507.

(*z*) *Id.*

(*a*) *Ante*, p. 144.

(*b*) The form here was to "rebuild and replace" the premises "in the same

state as they were in before the happening" of the fire.

(*c*) *Loader v. Kemp*, 2 C. & P. 375.

(*d*) As to its effect on the covenant to pay rent, see *ante*, pp. 168—170.

(*e*) *Newton v. Allin*, 1 Q. B. 518.

(*f*) *Morrison v. Chadwick*, 7 C. B. 266.

(*g*) See *infra*, p. 227.

in good or tenantable repair (*h*). A general covenant to repair is satisfied by a substantial (as distinguished from a literal) compliance with its terms (*i*). The amount and quality of the repairs necessary are always relative to the age, class, and condition of the premises at the time of the demise (*h*). Thus, if they consist of an old house, the tenant is only bound to keep it up *as* an old house, and not (speaking generally) to give the landlord the benefit of new work (*l*), or to restore it in a renewed form at the end of the term or of greater value than it was at the commencement (*m*); in other words, the tenant in such case is only bound to keep it as nearly as possible in the same condition as when it was demised to him (*n*), and for the diminution in value caused by the lapse of time or the elements he has been said not to be responsible (*o*).

Hence if a tenant takes a house which is of such a defective kind that by its own inherent nature it will in course of time fall into a particular condition of disrepair, such an effect is not within the covenant: for however large the words of the covenant may be, it is not a covenant to give a different thing from that which the tenant took when he entered into it (*p*). Where, for example, an old house was built upon a timber structure laid upon mud, the solid gravel being several feet below, and the only way in which the effect of time upon the house could be obviated was by underpinning it (*i.e.*, digging through the mud down to the gravel and then building up from that to the brickwork), it was held that work of this kind was not within the tenant's covenant to repair, uphold, and maintain the house, even though as the result of its

(*h*) Cf. *infra*, p. 226.

(*i*) *Harri v. Jones*, 1 Moo. & R. 173; *Stanley v. Towgood*, 3 Bing. N. C. 4; *Scales v. Lawrence*, 2 F. & F. 289; *Perry v. Cholsner*, 9 T. L. R. 488.

(*k*) *Payne v. Haine*, 16 M. & W. 541; *Proudfoot v. Hart*, 25 Q. B. Div. 42. It may be noticed here that it has now been provided that in the case of agricultural tenancies entered into after the end of the year 1938 a record of the condition of the buildings, fences, gates, roads, drains, ditches, and cultivation of the holding, at the commencement of the tenancy, may be made within three months of that time, at the instance of either party, by a person to be appointed (in default of agreement) by the Board of Agriculture, the cost of making it being borne by the parties (in default of agreement) in equal shares: 6 Edw. 7, c. 56, ss. 7, 9.

(*l*) *Harri v. Jones*, *supra*; *Soward v. Leggatt*, 7 C. & P. 613; *Scales v. Lawrence*, *supra*.

(*m*) *Gutteridge v. Munyard*, 1 Moo. & R. 334.

(*n*) *I.e.*, as regards its *class*, for (as will be seen presently: *infra*, p. 225) by a mere undertaking to keep premises in repair he may have to put them into repair, and keep them in better repair than that in which he took them. In *Payne v. Haine*, there cited, it will be seen that the Court granted a new trial, the judge at the hearing having directed the jury that the tenant had sufficiently discharged his obligation if he left the premises in as good plight as he found them.

(*o*) Per Tindal, C. J., *Gutteridge v. Munyard*, *supra*. But see last note.

(*p*) Per Lord Esher, M. R., in next-cited case.

not being done the house had to be pulled down altogether (*q*). So where a notice had been served on a tenant by the local authority to secure the brickwork of a bay window on the premises, and it was shown that owing to the house being old and badly built it was impossible to re-erect the window as before without its being condemned as dangerous, and that a new bay window could only be erected by building supports of a substantial character, it was held that the replacing of the old window was not within the scope of the ordinary covenant to repair, and that the tenant had done enough to comply with his obligation by building a new one set back in the main wall of the house (*r*). It follows, too, that the lessee may always give evidence of the state of repair in which the premises were at the time of the demise (*s*), though only generally and not by entering into matters of detail (*t*), and only so far as it goes to show their age, character, and class, and the extent to which he has performed his contract (*u*). In other language, though a tenant is not allowed to say that he found the premises out of repair and therefore left them out of repair or put them into imperfect repair, he is at liberty to show that either by original construction or by lapse of time they were of a particular class, and that he had done to them such repairs as were suitable to that class and sufficient to keep them in that class; and the evidence in question will always be admissible to show how far the premises were capable of being repaired at all, and what amount of repair could have been contemplated by the covenant (*x*).

Sometimes the undertaking to do repairs is qualified by the addition of the words "fair wear and tear excepted,"—a qualification not infrequent in the case of agreements for short terms, and sometimes found in leases for longer periods (*y*). It does not seem altogether clear what the precise effect of such a clause is. It has been said that it renders the tenant free from liability for such dilapidations as are caused, *e.g.*, to the walls and floors by traffic and other reasonable user of the premises (*z*). But though it

(*q*) *Lister v. Lane*, [1893] 2 Q. B. 212.

(*r*) *Wright v. Lawson*, 19 T. L. R. 203, 510.

(*s*) *Burdett v. Withers*, 7 A. & E. 136.

(*t*) *Muntz v. Goring*, 4 Bing. N. C. 451.

(*u*) *Haldane v. Newcomb*, 12 W. R. 135.

(*x*) *Mayne on Damages*, p. 289 (7th

ed.), where a house is compared to a ship, which varies in class according to its original construction, and which descends in class by age and wear and tear and general deterioration.

(*y*) *E.g.*, *Wright v. Goddard*, 8 A. & E. 144; *Soales v. Lawrence*, 2 F. & F. 289; *Davies v. Davies*, 38 Ch. D. 499.

(*z*) See per Kekewich, J., in last-cited case, at p. 505.

includes destruction of the premises to some extent, *e.g.* (as just stated), of surface by ordinary friction, it will not absolve the tenant from liability in the case of total destruction of the premises by an accident never contemplated by either party (*a*). Perhaps the effect of the clause may be not improperly described as that of throwing upon the landlord the burden of showing that the dilapidations complained of are either the result of damage (whether wilful, negligent, or accidental), or that they have been caused by something other than mere user, *e.g.*, by not repairing at an earlier stage. Where by a lease (which contained no covenant to repair during the term) the lessee undertook to deliver up the premises at its expiration in as good repair and condition as they were in at the date of the demise, "reasonable wear and tear excepted," it was held that the exception applied equally to the outside as to the inside of the premises, that the tenant was exonerated from dilapidations caused by the friction of the air, by exposure, and by ordinary use, and that he was consequently not liable for the expense of outside painting (*b*).

In some leases, it may be added here, the lessee expressly undertakes to rebuild the premises demised to him : and such a covenant is not of course satisfied by mere repairs (*c*). An undertaking of this kind does not, however, necessarily impose on him the obligation to erect the new premises in the same form and style and of the same elevation as the old, and *à fortiori* when it is stipulated that the former should be made suitable for a purpose to which the latter were not applied (*d*). Occasionally, too, the option of repairing or rebuilding is conferred by the covenant on the lessee (*e*).

If the covenant be merely to "keep" premises in good repair, the tenant must fulfil it by first putting them, if necessary, into such repair, always having regard to their age and class, *i.e.*, as old premises, if they are of that nature (*f*). This decision is to the effect that, in order to satisfy the tenant's obligation under his contract, it is "not sufficient for him to deliver up the premises in the same condition of repair as when he took them; he must deliver them up in good repair, even if they were not in good repair when the tenancy began" (*g*). And if he agree to put the

(*a*) *Manchester Bonded, &c., Co. v. Carr*, 5 C. P. D. 507, at p. 513.

(*b*) *Terrell v. Murray*, 17 T. L. R. 570.

(*c*) *London (City of) v. Nash*, 3 Atk. 512.

(*d*) *Low v. Innes*, 4 D. J. & S. 286.

F.

(*e*) *Evelyn v. Raddish*, 7 Taunt. 411.

(*f*) *Payne v. Haine*, 16 M. & W. 541. (So where the covenant is by the lessor : *Saner v. Bilton*, 7 Ch. D. 815.)

(*g*) Per Lord Esher, M. R., in *Proudfoot v. Hart*, 25 Q. B. Div. at p. 51.

Q

premises into "habitable repair," he impliedly undertakes to put them into a better state of repair than that in which he found them (*h*). So an agreement "to do necessary repairs" involves putting the premises into repair at the commencement of the tenancy (*i*), though (as regards the question of time) even if the stipulation be to repair "forthwith," the covenant must receive a reasonable and not a literal construction (*k*).

Probably the commonest form of the undertaking on the part of the tenant is to leave the premises in "tenantable" repair. This means—and good repair (*l*) is "much the same thing" (*m*)—such repair as having regard to the age, character, and locality of the premises would make them reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take them (*n*). Under such a covenant the tenant at the end of his term is not liable for repairs of a decorative kind (*e.g.*, painting, papering, white-washing, &c.), unless they are necessary to prevent the fabric of the premises from going into decay (*o*), or unless they are otherwise necessary to make the premises reasonably fit for the reception of a new tenant of the kind described (*p*); nor is he, so long as he fulfils this condition, bound in making such repairs to employ materials of the same kind or value as were used when the tenancy began (*p*). And similarly as regards repairs of a structural kind,—if portions of the fabric (*e.g.*, floors) are out of repair he is not necessarily bound to replace them, but if he can make them good so as reasonably to satisfy a new tenant of the character spoken of, he fulfils his covenant (*q*).

Sometimes the tenant agrees to restore the premises to the landlord in the same condition as when he took them (*r*); and an agreement under which a tenant who is to receive possession at a future date undertakes to leave the premises "in the same state as they now are" may refer to their condition, not at the time of the agreement, but at the commencement of the tenancy (*s*). It

(*h*) *Belcher v. McIntosh*, 8 C. & P. 720.

(*i*) *Truscott v. Diamond Rock Co.*, 20 Ch. Div. 251, per Jessel, M. R.

(*k*) *Doe v. Sutton*, 9 C. & P. 706.

(*l*) As to which, see observations of Kindersley, V.-C., in *Cooke v. Cholmondeley*, 4 Drew. 326.

(*m*) Per Lord Esher, M. R., in next-cited case.

(*n*) *Proudfoot v. Hart*, 25 Q. B. Div. 42.

(*o*) *Crawford v. Newton*, 36 W. R. 54.

Cp. *Mozon v. Townshend (Lord)*, 2 T. L. R. 717; affd., 3 T. L. R. 392.

(*p*) *Proudfoot v. Hart*, *supra*.

(*q*) *Id.*

(*r*) *Winn v. White*, 2 W. Bl. 840. Subject to an exception of wear and tear: *Terrell v. Murray*, 17 T. L. R. 570; *supra*, p. 225.

(*s*) *White v. Nicholson*, 4 M. & Gr. 93. Cp. *Loader v. Kemp*, 2 C. & P. 375; cited *supra*, p. 222.

has been said that "if one covenant to keep and leave a house in the same or as good plight as it was at the time of the making of the lease, in this case the ordinary and natural decay of it is no breach of the covenant; but the covenantor is hereby bound to do his best to keep it in the same plight, and therefore to keep it covered, &c." (t). An undertaking of the kind now described is not uncommon in the letting of furnished houses: and it will bind the tenant to use the furniture in a tenant-like manner (u).

With regard specially to *painting*, it has been ruled that a covenant by the lessee to "substantially repair, uphold, and maintain" a house makes him liable to "keep up" the inside painting (x). But even where it was specially stipulated for, *e.g.*, in a covenant contained in a seven years' lease to "repair, uphold, sustain, paint, glaze, cleanse, scour, &c., with all needful reparations and cleansings, and to leave the premises in such repair, reasonable wear and tear excepted," and he had painted the premises over during the term, it was held that he was not bound to repaint (except where the paint was destroyed), but only to cleanse the old paint (y). An undertaking to keep premises in repair and to paint the inside at the end of every period of seven years during the term is not broken by the mere existence, during the currency of one of such periods, of defects of painting the existence of which at the end of it would cause a breach of the covenant (z).

A covenant to "make, uphold, support, cleanse and repair, and keep in repair" all drains does not extend to the making of a new drain constructed under a re-arrangement of the whole system (a). It has been held, too, that an undertaking (b) to keep drains in good tenantable repair and condition—following on a stipulation that after the expenditure of a specified sum in necessary repairs there should be no liability to execute others except repairs (*inter alia*) to the drains—was confined to keeping the drains as they existed in a condition of good tenantable repair, and that it did not extend to the rectification of structural defects (c).

(t) *Shep. Touch.* 168.

(u) *Stanley v. Agnew*, 12 M. & W. 827, per Parke, B. It is presumed that even in the absence of any agreement a like obligation would in such case be imposed on the tenant: see p. 149, *ante*.

(x) *Monk v. Noyes*, 1 C. & P. 265.

(y) *Scales v. Lawrence*, 2 F. & F. 289.

(z) *Perry v. Chotzner*, 9 T. L. R. 488.

(a) *Lyon v. Greenhow*, 8 T. L. R. 457.

(b) The undertaking in this case was by the lessor.

(c) *Hugall v. McLean*, 1 T. L. R. 53; C. & E. 391, per Wills, J., who suggests (see C. & E. at p. 392) that the covenant properly extends to defects like bricks out of place, pipes broken, or pieces of mortar gone. The decision was affirmed by the C. A. on another ground: 53 L. T. 94. See *infra*, p. 236.

A covenant to do certain repairs to the satisfaction of the landlord's surveyor is fulfilled (as it has been held) if the repairs done are of such a character as ought in reason to have secured his satisfaction (*d*). But the mere circumstance that the lessee may have *bonâ fide* employed persons to repair affords no answer to an action by the lessor if the covenant has in fact been broken (*e*).

Acts amounting to breach.—Opening doors (*f*), or permitting them to be opened (*g*), in the wall of a demised house, either within the house itself, or into an adjoining house (*h*), is a breach of the general covenant to keep in repair. But where the lease from its very terms contemplates the making of alterations and improvements in the premises by the tenant, such acts as enlarging windows, opening external doors, and removing partitions cannot amount to a breach of that covenant (*i*). A covenant to repair, uphold, and maintain the brick walls belonging to the demised premises was held to be broken by pulling down a wall dividing a front from a side courtyard of the house (*k*), and a covenant to keep in repair the external parts of a house (*i.e.*, those which form the inclosure of the premises and beyond which no part of them extends (*l*)) by allowing the partition wall between it and an adjoining house to sink and become ruinous after the latter had been pulled down (*m*). But an agreement to keep in repair premises of which a piece of ornamental water formed part was held not to be broken by a neglect to cleanse the water, by which a nuisance was caused (*n*).

Damages.—Apart from the landlord's right (by express agreement only (*o*)) to enter and do necessary repairs at the tenant's expense, and from his general right (also only if reserved to him by the lease) of re-entry for breach of covenant (*p*), his sole remedy for breach of the covenant to repair is by an action for damages, inasmuch as specific performance of the covenant, or, what comes to the same thing, an injunction to restrain its breach, will not be decreed (*q*).

(*d*) *Doe v. Jones*, 2 C. & K. 743. Cp. *Dallman v. King*, 4 Bing. N. C. 105; cited *supra*, p. 217.

(*e*) *Nokes v. Gibbon*, 3 Drew. 681.

(*f*) *Gange v. Lockwood*, 2 F. & F. 115.

(*g*) *Borgnis v. Edwards*, 2 F. & F. 111.

(*h*) *Doe v. Jackson*, 2 Stark. 293.

(*i*) *Doe v. Jones*, 4 B. & Ad. 126.

(*k*) *Doe v. Bird*, 6 C. & P. 195.

(*l*) Per Lord Denman, C. J., in next-cited case.

(*m*) *Green v. Eales*, 2 Q. B. 225. The covenant in this case was by the lessor.

(*n*) *Bird v. Elwes*, L. R. 3 Ex. 225. The agreement was here also by the lessor.

(*o*) *Infra*, p. 236.

(*p*) *Post*, p. 316.

(*q*) *Hill v. Barclay*, 16 Ves. 402, per Lord Eldon, L. C.; Fry on Specific Performance, p. 41 (4th ed.).

The measure of damages in such an action will be best considered under three heads: (1) Where the term is still running; (2) Where the term has come to an end; (3) Where the lessee has made an underlease.

(1) The measure of damages for breach of the covenant to repair during the currency of the term is the loss which has ensued to the lessor's reversion (*r*), a loss which will clearly be greater or less according as the term, upon the happening of the breach, has a less or greater time to run (*s*); and it seems that while the jury on the one hand are not bound to give the cost of repairing, they are not limited on the other to nominal damages, even when the length of the term unexpired is so great that no real damage can be proved, or the accumulated proceeds of investment of a nominal sum would at the end of the term provide more than a sufficient fund (*t*). (So the measure of damages upon breach by the lessee of a covenant to build is not the cost of the building, but the real loss to the reversion (*u*).) Thus, where a lessee covenanted to do certain repairs and to keep the premises in as good a state as they would be in when repaired by him, and they were destroyed by fire (so that he became bound to reinstate them (*x*)), it was held that he was only liable to make good the actual loss to the reversion, and was consequently not bound to rebuild in such a way as to give new premises for old (*y*).

Where a lessor, upon default to repair by his lessee, does the repairs himself (having reserved to himself the right of entry necessary for the purpose (*z*)), it has been said that he will be entitled to recover from him their cost (*t*); and where before an action was commenced against him the lessee sold his interest in the premises to a third person who pulled them down and rebuilt them, it was held that the lessor was still entitled to recover from the lessee the

(*r*) *Doe v. Rowlands*, 9 C. & P. 734; *Mills v. East London Union*, L. R. 8 C. P. 79. The dictum of Holt, C. J., in *Vivian v. Champion*, 2 Ld. Ray. 1125, that the measure of damages in this case (as it is in the next) is the cost of the repairs, may be regarded as definitely overruled by the later cases, if intended, that is, to be enunciated as a hard and fast rule: per Lord Herschell, in *Conquest v. Ebbetts*, [1896] A. C. 490. On the other hand, the ruling of Rolfe, B., in *Marriott v. Cotton*, 2 C. & K. 553, that only nominal damages can be recovered, was apparently reversed in a subsequent stage (unreported) of the case (see

Mayne on Damages, p. 281, 7th ed.), and is clearly not law.

(*s*) *Doe v. Rowlands*, *supra*, per Coleridge, J.; *Turner v. Lamb*, 14 M. & W. 412.

(*t*) *Joyner v. Weeks*, [1891] 2 Q. B. 31, per Wright, J. The decision itself was reversed in the C. A.: *infra*.

(*u*) *Oldershaw v. Holt*, 12 A. & E. 590; *Wigsell v. School for Indigent Blind*, 8 Q. B. D. 357.

(*x*) *Supra*, p. 221.

(*y*) *Yates v. Dunster*, 11 Exch. 15. See as to this case *supra*, p. 222.

(*z*) See *infra*, p. 236.

whole sum he had expended on the repairs (*a*). (On the other hand, it has been said that a reversioner who does repairs himself on his lessee's default, not having been injured by anything done or omitted to be done by the latter, cannot recover substantial damages (*b*).) It is perhaps difficult to see why a lessor, who, in the case of a lease having many years to run, could recover, in accordance with what has already been laid down, little more than nominal damages, should be in so much more advantageous a position by force of a mere stipulation that he should have the right to do the repairs himself upon default of his lessee; and it might well be urged that if he is to be entitled to recover the cost of the repairs from the tenant there ought to be an express agreement to that effect, and that in its absence liability for them on the part of the latter ought not to be implied (*c*). In the present state of the authorities it would appear at any rate always advisable for the lessor to stipulate expressly, not merely that he may do the repairs upon default being made, but that if he does he may recover their cost from the tenant (*d*).

The damages recoverable, it may be mentioned, are not necessarily confined to those which have been sustained at the time the action is brought (*e*).

The application of the above rule to the case of an underlease will be considered in some detail presently (*f*).

(2) Where the term has come to an end and the action is consequently on the covenant to *leave* in repair, the measure of damages is ordinarily (*g*) the sum it would take to put the premises into the state of repair in which the lessee ought to have left them according to the terms of his covenant (*h*). A percentage

(*a*) *Colley v. Streeton*, 2 B. & C. 273. (Case of an underlease: *infra*, p. 235.)

(*b*) *Williams v. Williams*, L. R. 9 C. P. 659, per Lord Coleridge, C. J., cited *infra*, p. 235. This was also the case of an underlease, and the statement as to there being in such case no injury to the lessor by any act of the lessee seems to require considerable qualification in view of his liability to his superior landlord. See *Conquest v. Ebbette*, *supra*, and *infra*, p. 233.

(*c*) It may be added by way of caution that the observations in the text apply only to the case where the lessor is not himself holding under a lease. See next note.

(*d*) In the case of an underlease, as

will be seen presently (*infra*, p. 235), the lessor can recover the cost of the repairs without doing them first; as also where he has done them to save a forfeiture, even though he has no right of entry reserved to him by the lease. See *Colley v. Streeton*, cited *infra*, p. 235.

(*e*) *Shortridge v. Lamplugh*, 2 Ld. Ray. 798. And see now R. S. C. 1883, O. 36, r. 58.

(*f*) See *infra*, p. 232.

(*g*) See next paragraph.

(*h*) *Morgan v. Hardy*, 17 Q. B. D. 770 (reversed subsequently on another point: see note (*u*), p. 431, *post*); *Joyner v. Weeks*, [1891] 2 Q. B. 31; *Brown v. Trumper*, 26 Beav. 11.

for depreciation in value of the premises since the beginning of the tenancy may, in conformity with the rule already stated (*i*), be allowed (*k*). It seems that the lessor will not be entitled to recover, as part of the damage he has sustained, the expense to which he has been put—however reasonably it may have been incurred—in employing a surveyor to ascertain the condition of the premises (*l*). But he may recover, not only the actual cost of the repairs, but also some compensation for the loss of the use of the premises whilst the repairs are being done (*m*); and this even though the more substantial part of the repairs are by agreement to be done by the lessor himself (*n*). The right to recover damages for breach of the covenant to leave in repair is vested in the landlord immediately the term ends; hence, neither the fact that afterwards (but before the repairs are done) he enters into a binding agreement with an incoming tenant to pull down and rebuild the premises (*o*), nor the fact that on resuming possession he pulls down a portion of the premises to make structural alterations (*p*), can deprive him of his right to substantial damages as ascertained by the general rule already enunciated.

Such general rule, if not of universal application, will apply, at all events, unless there be something which affects the condition of the property in such a manner as to affect the relation *between the lessor and the lessee* in respect to it (*q*). Hence the amount of damages will not, for instance, be controlled by the fact that, by reason of the terms of a lease granted by the lessor to a third person to commence from the expiration of the lessee's interest, the actual loss to the lessor will be considerably less or even nothing at all (*r*). And it makes no difference that the lessor's own interest in the premises may have been determined by forfeiture to the head landlord, either in consequence of his own act (*s*), or in consequence of the breach of the covenant by his lessee (*t*). Similarly,

(*i*) *Supra*, p. 223.

(*k*) See *Henderson v. Thorn*, [1893] 2 Q. B. 164, cited *infra*, p. 232.

(*l*) *Logan v. Cox* (Field, J.), cited in *Mayne on Damages*, p. 291 (7th ed.). It will be seen hereafter (*post*, pp. 651, 662) that in two special cases an exception to this rule is provided for by statute.

(*m*) *Birch v. Clifford*, 8 T. L. R. 103; *Proudfoot v. Hart*, 25 Q. B. Div. 42, per Cave, J. Cp. *In re Carruthers*, 15 R. 317, cited *post*, p. 458.

(*n*) *Woods v. Pope*, 1 Bing. N. C. 467.

(*o*) *Rawlings v. Morgan*, 18 C. B. N. S. 776.

(*p*) *Inderwick v. Leech*, 1 T. L. R. 484.

(*q*) Per Lord Esher, M. R., in next-cited case.

(*r*) *Joyner v. Weeks*, [1891] 2 Q. B. 31.

(*s*) *Davies v. Underwood*, 2 H. & N. 570. Such act, however, under the present practice might afford ground to the underlessee for a valid counter-claim.

(*t*) *Clow v. Brogden*, 2 M. & Gr. 39.

the fact that the demised premises and the surrounding property have so diminished in value since the beginning of the lease, as to render a portion of the repairs otherwise required to fulfil the covenant (at all events unless executed at a cheaper rate) unsuited to the premises and unnecessary to their use and enjoyment, has been held to be no ground for a diminution of the damages (*u*). And where a tenant pulled down some cottages on the demised premises which he had covenanted to keep in good repair, it was held that the measure of damages was their value as they stood, without reference to the result of their removal in regard to the general improvement of the premises (*x*). If the landlord brings an action for breach of the covenant at the end of the term after having already recovered damages for a breach during the term (*y*), he must deduct from the sum necessary to put the premises into proper repair the sum he has already received; but he is not necessarily restricted to the mere items of damage which have accrued since the bringing of the former action, even if the proceedings therein have ended by his acceptance, in satisfaction of his claim, of a sum no part of which has been expended by him in repairs to the premises (*z*).

And where (in the case of an underlease) the mesne lessor's liability—in conformity with the principle to be next adverted to—to deliver up the premises in repair at the end of the term to the head landlord had been taken into account when damages had been recovered by him against his underlessee for breaches during the term, it was held that the sum then recovered (together with interest at four per cent. from the date of its recovery to the end of the term) must be deducted, in an action for breach of covenant to deliver up in repair, from the cost necessary to put the premises into that condition of repair in which they ought to have been left on the expiration of the term (*a*).

(3) In dealing with underleases, no modification of the foregoing principles is necessary so far as the second class of cases is

(*u*) *Morgan v. Hardy*, 17 Q. B. D. 770. It should, however, be noticed that this decision (as to which see note (*h*), *supra*) was before the rule in *Proudfoot v. Hart*, 25 Q. B. Div. 42, was laid down. And it would now seem that the diminution in value of the premises might have some bearing on the damages recoverable, so far as it would

tend to lessen the requirements of the reasonably-minded incoming tenant (*supra*, p. 226) of the class likely to take the premises.

(*x*) *Woolcock v. Dew*, 1 F. & F. 337.

(*y*) *Supra*, p. 229.

(*z*) *Henderson v. Thorn*, [1893] 2 Q. B. 164; cited *supra*, p. 231.

(*a*) *Elbette v. Conquest*, 82 L. T. 561.

concerned (*b*); but as regards the first it seems clear that the rule already laid down can no longer apply in its integrity. For where the reversion of the mesne lessor, as in the majority of cases, is one of only trifling duration, and consequently—at least where the rents reserved by the lease and underlease are substantially the same—of no pecuniary value, the actual loss he sustains by the underlessee's breach can be little more than nominal, whilst his liability over to his own landlord may be a very serious matter. Inasmuch as that liability—at all events where the underlessee has notice on the face of his instrument of demise that it is an underlease (*c*)—may be reasonably supposed to have been within his contemplation as the probable result of his breach of covenant (*d*), the real measure of damages in such cases is the difference between the value of the mesne lessor's reversion (*e*) with the covenant performed as it ought to be and the value of that reversion with the covenant unperformed as it ought not to be (*f*): or, in other words, the actual cost of the repairs, with a discount or allowance for the time to elapse before the end of the underlease (*g*). And, as in the cases last discussed, it is no ground for diminution of damages that, owing to the changed circumstances of the neighbourhood the mesne lessor might not be required by the head landlord to put the premises into repair, or pay the full cost of effecting the repairs, at the end of the term (*h*).

In the case of an underlease it is to be observed that, though the covenants to repair in the lease and sub-lease may be in words identically the same, they are in effect different, in so far as they are entered into at different times (*i*) and extend to different periods (*k*). Hence a lessee who makes an underlease with similar repairing covenants to those in his own lease is not necessarily

(*b*) It will be noticed that some of the cases cited under that head (*e.g.*, *Ebbetts v. Conquest*, *Davies v. Underwood*, and *Clow v. Brogden*, *supra*) relate to underleases.

(*c*) It seems possible that such notice is not essential: see p. 426, *post*.

(*d*) See *Hadley v. Bazendale*, 9 Exch. 341.

(*e*) It will be seen, from the report of the case next cited in the H. L., that the underlease was at an improved rent: so that the rule mentioned in the text is not confined to the case where the value of the underlessor's reversion is merely nominal.

(*f*) Per Lindley, L. J., in next-cited case.

(*g*) *Ebbetts v. Conquest*, [1895] 2 Ch. 377; *affd.*, H. L., *Conquest v. Ebbetts*, [1896] A. C. 490. There seems perhaps no adequate reason why the rule that damages for breach of the covenant to repair should *prima facie* be the cost of the repairs, with a rebate for the unexpired period of the term, should not be made of general application, so as to embrace covenants to keep in repair, to leave in repair, and the case of underleases, in a single proposition.

(*h*) *Conquest v. Ebbetts*, *supra*.

(*i*) *Penley v. Watts*, 7 M. & W. 601; *Walker v. Hatton*, 10 M. & W. 249; *Pontifex v. Foord*, 12 Q. B. D. 152.

(*k*) *Minshull v. Oakes*, 2 H. & N. 793.

entitled to recover the whole amount for which he may have become liable in respect of dilapidations to his own lessor (*l*). And when an action has been brought against him for that sum, it has been held that he cannot afterwards render the underlessee responsible for its costs, either where he lets judgment go by default, and such costs are incurred in assessing the damages (*m*), or where he gives notice to the underlessee of the action, and, upon the latter repudiating his liability, of his intention to hold him responsible for the costs (*n*). It should, however, be observed that these last-cited cases were decided before the general rule as to damages for breach of contract which is now accepted was first enunciated (*o*): but whether that rule would extend to contracts other than those of sale and sub-sale, so as to permit a lessee under the circumstances just set forth to recover the costs he has incurred, as being part of the damages within the contemplation of the parties as the probable result of the lessee's breach of covenant, though no longer to be regarded as entirely an open question (*p*), has not yet been the subject of express decision (*q*).

To make himself safe, a person underletting premises which he holds under repairing covenants should always exact from the underlessee a covenant of indemnity, though even this will not cover costs and expenses unless they have been necessarily incurred (*r*). For where the underlessee enters into this covenant (*s*)—or, what comes to the same thing, when he undertakes to perform the covenants of the original lease (*e.g.*, where his undertaking is to hold "subject in all respects to the terms of the existing lease and the covenants and stipulations contained therein" (*t*))—the lessee, upon being sued by his lessor, may avail himself of the modern procedure provided in such cases (*u*) by bringing in the underlessee as third party to the action: a procedure which will be open to him only where the underlessee's covenant is strictly one of indemnity (*x*). (The same principle applies when the sub-interest is created by assignment instead of by underlease (*y*).) Without such an indemnity a lessee who has incurred

(*l*) *Penley v. Watts*, *supra*.

(*m*) *Id.*

(*n*) *Walker v. Hatton*, 10 M. & W. 249; disapproving *Neale v. Wyllie*, 3 B. & C. 533.

(*o*) *Hadley v. Bazendale*, 9 Exch. 341.

(*p*) See *Ebbetts v. Conquest*, [1895] 2 Ch. 377, per Lindley, L. J., who answers the question in the negative.

(*q*) See *Hammond v. Bussey*, 20 Q. B. Div. 79.

(*r*) *Walker v. Hatton*, *supra*, per Lord Abinger, C. B.

(*s*) *Morgan v. Hardy*, 17 Q. B. D. 770. See on this case, p. 230, note (*h*), *supra*.

(*t*) *Hornby v. Cardwell*, 8 Q. B. Div. 329.

(*u*) R. S. C. 1883, O. 16, rr. 48—55.

(*x*) *Pontifex v. Foord*, 12 Q. B. D. 152.

(*y*) *Byrne v. Brown*, 22 Q. B. Div. 657; *Gooch v. Clutterbuck*, [1899] 2 Q. B. 148. See *post*, p. 432.

forfeiture of his lease through the sub-lessee neglecting to repair cannot recover from the latter for the loss of his beneficial reversion in the term (z); and *à fortiori* where it does not appear that the forfeiture was incurred by reason only of a breach of covenant contained in the underlease (a).

Where the original lessor gives a notice to repair to his lessee, and the latter gives notice to the sub-lessee, and upon his default in doing the necessary repairs does them himself to save a forfeiture, it has been held that, though he may be a trespasser for entering the premises (b), he may recover for the cost of the repairs from the sub-lessee (c). (In that case, however, the sub-lessee had received proper notice to repair before the commencement of the action (d).) But where both a lease and sub-lease contained general covenants to repair and also covenants to repair after notice (e) (three months in the former and two in the latter), it was held that the lessee, who, after giving notice in compliance with the terms of the sub-lease, had entered and done the repairs himself to save a forfeiture and then brought his action before the expiration of the notice, was not entitled to recover; for with regard to the special covenant (to repair after notice) he had brought his action too soon, while with regard to the general covenant he was only entitled to nominal damages, as no loss had ensued to the reversion from any act of the sub-lessee (f).

It has been doubted, however, whether the existence of a special covenant to repair after notice would in itself prevent a lessor from recovering full damages in an action upon the general covenant, if he chose to rely exclusively upon it (g); and, moreover, having regard to the principle already referred to, which may now be said to be firmly established, that the lessor's own liability is an important consideration to be attended to, it is thought that the above decision cannot be supported.

Covenant by the lessor.—Where the obligation to repair the demised premises, as occasionally happens in lettings, is undertaken

(z) *Logan v. Hall*, 4 C. B. 598.

(a) *Clow v. Brogden*, 2 M. & Gr. 39.

(b) *Infra*, p. 236.

(c) *Colley v. Streeton*, 2 B. & C. 273; *supra*, p. 229. In such a case only nominal damages as a rule would probably be given for the trespass.

(d) *Per Grove, J.*, in next-cited case.

(e) *Supra*, p. 217.

(f) *Williams v. Williams*, L. R. 9 C. P. 659. A notice to repair under the terms of the original lease had also been served by the head landlord upon the premises, but such notice was held to be no notice to the sub-lessee as being no party to that lease.

(g) *Mayne on Damages*, p. 284 (7th ed.).

by the lessor (*h*), notice to him of the want of repair is necessary before his liability can arise (*i*), inasmuch as a condition to that effect is imported into the covenant (*k*); nor are the means of knowing equivalent for this purpose to actual notice (*l*). The necessity for notice has been said to be based on the fact that he has no right of access to the premises, whilst the tenant, as occupier, has the means of knowing of any want of repair (*m*). The rule, too, has been held to apply to the case where the lessor's covenant extends only to the outside of the premises (*n*), though he might then gain a knowledge of the necessity of repairs by mere observation (*o*). Such a covenant, however, carries with it an implied licence to the lessor to enter upon the premises, and to occupy them for a reasonable time to do that which he has covenanted to do (*p*); nor does the existence of an express covenant for quiet enjoyment make any difference in this respect (*q*). In the absence of a covenant by the lessor (*e.g.*, in the ordinary case where the covenant to repair is by the lessee), the lessor has no right to enter upon the premises for the purpose of doing repairs (*r*), even though the result of non-repair may be a forfeiture of his own lease (*s*). (In the case, however, of an agricultural holding (*t*) it is now expressly provided by statute (*u*) that the landlord, or any person authorized by him, may at all reasonable times enter on the holding, or any part of it, for the purpose of viewing the state of the holding.) Hence the necessity of an express covenant, found in most leases, to allow the lessor to enter upon the premises at any reasonable time (sometimes only after notice (*x*)), in order to view their condition with regard to repairs and do the necessary repairs upon the lessee's default at the latter's expense (*y*).

(*h*) As to the right of the lessee to execute repairs on his default and to set off the expense against rent, see *post*, p. 559.

(*i*) *Makin v. Watkinson*, L. R. 6 Ex. 25; *Manchester Bonded, &c., Co. v. Carr*, 5 C. P. D. 507; *Broggi v. Robins*, 15 T. L. R. 224.

(*k*) *Makin v. Watkinson*, *supra*, per Channell, B.

(*l*) *Hugall v. McLean*, 53 L. T. 94. Both in this case and in *Torrens v. Waller*, *infra*, the view was expressed that notice must come from the tenant and not *aliunde*.

(*m*) *Tredway v. Machin*, 91 L. T. 310.

(*n*) *Torrens v. Walker*, [1906] 2 Ch. 166.

(*o*) See *Makin v. Watkinson*, *supra*, per Channell, B., who seems on this ground to have inclined to the contrary view.

(*p*) *Saner v. Bilton*, 7 Ch. D. 815.

(*q*) *Id.*, at p. 824.

(*r*) *Barker v. Barker*, 3 C. & P. 557.

(*s*) *Stocker v. Planet Building Society*, 27 W. R. 877.

(*t*) As to what is such a holding, see 46 & 47 Vict. c. 61, s. 51; and as to the tenancies here in question, see *sect. 61. Post*, p. 728.

(*u*) 63 & 64 Vict. c. 50, s. 5.

(*x*) *Doe v. Bird*, 6 C. & P. 195.

(*y*) See p. 230, *supra*.

The principles already referred to (z), limiting the liability of the *tenant* on the covenant to repair to such repairs as may be suitable to the class to which the premises belong, apply also (as it has been held) where the covenant is by the landlord; for if the lessee is not bound to give back to the lessor at the end of the term a different thing from that which was demised to him, neither is the lessor bound, by a similar covenant, to give to the lessee during the term a different thing from that which the lessee took from him at the beginning of his tenancy (a). Hence where from the effect of time on the materials used, as well as of faulty construction, a house during a demise, in which the lessor had covenanted to keep the outside in repair, had fallen into such a condition that repairing without rebuilding was impossible, it was held that the lessor was not liable (b).

An agreement by the lessor to put the premises into good tenantable repair does not amount to an undertaking to put them into such repair for any particular purpose for which, to his knowledge, the lessee may intend to use them (c).

It should be further noticed that upon breach of a covenant to repair during the term by the landlord, the tenant cannot recover expenses incurred by him in entering upon and fitting up other premises whilst the repairs are being executed (d).

It may be mentioned here (though a fuller discussion of the matter properly belongs to the law of torts, and does not fall within the scope of this treatise (e)), that where the lessor undertakes to repair, he may render himself liable to a stranger for a nuisance or injury arising from the want of repair (f). But for this it must be shown that the effect of his contract is to vest for this purpose the control (g) of the premises—which is *primâ facie* in the occupier (h)—in him; a mere undertaking by the lessor,

(*) *Supra*, pp. 222-6.

(a) Per Warrington, J., in next-cited case.

(b) *Torrens v. Walker*, [1906] 2 Ch. 166. But is not this to lose sight of the fact that the position in the matter of the lessor, when called upon to deal with what after all is his own property, seems from the point of view of hardship to be altogether different to that of the lessee?

(c) *McClure v. Little*, 19 L. T. 287.

(d) *Green v. Eales*, 2 Q. B. 225. As to the corresponding rule on breach of the covenant by the tenant, see *supra*, p. 231.

(e) See Addison on Torts, pp. 496, 500 (8th ed.).

(f) *Payne v. Rogers*, 2 H. Bl. 349; *Mills v. Temple-West*, 1 T. L. R. 503.

(g) It has been stated (per Lord Atkinson, in *Cavallier v. Pope*, *infra*) that this imports the power and right (not conferred upon him by his obligation to repair) to admit people to, and exclude them from, the premises; but if this is so it is difficult to see how it can apply to any case where there is a real tenancy at all. See *ante*, pp. 7, 8.

(h) See *Russell v. Shenton*, 3 Q. B. 449 (explaining *Payne v. Rogers*, *supra*); *Hadley v. Taylor*, L. R. 1 C. P. 53. The

for instance, given during the currency of a tenancy to execute specified repairs on pain of the tenant determining his interest is not sufficient for this purpose (*i*). And the act complained of must be in the nature of a public nuisance—*e.g.*, injury to a person passing along a highway (*j*),—for to him the lessor is under a duty to take reasonable care. An injury, for example, to a member of the tenant's family arising from a defect in the interior of a house is not within the rule (*i*); and *à fortiori* when it is shown that the defective condition of the premises was known to the plaintiff (*i*). The above is the only case where such liability arises—apart, that is, from misfeasance: for where the nuisance is the necessary consequence of the mode of occupation contemplated by the demise, the lessor will also be held liable (*k*). And liability can be enforced against him where the premises are demised in a ruinous or unsafe condition, and injury is consequently caused (as in the case just discussed) to a person with regard to whom he has a duty, by reason of all the circumstances, imposed on him (*l*), as to a member of the public using the highway (*m*), or an occupier of adjoining property (*n*): but not where, though the defects be shown to have existed at the time of the letting, no such duty exists, as in the case of a stranger or a friend of the tenant's meeting with injuries on the premises from their dilapidated condition (*o*).

This liability of the lessor where he has bound himself to repair (and the same thing holds in the case of misfeasance) is based on the presumption that, under the above circumstances, he has authorized the continuance of the nuisance (*p*); so that where there is an obligation to repair on the lessee, knowledge of the nuisance on the part of the lessor at the time of letting will not, as it seems, render him liable (*q*). The principle as to the

occupier (it may be added) may in this way, as it appears, rebut the presumption of his liability: per Collins, M. R., in next-cited case.

(*i*) *Cavalier v. Pope*, [1905] 2 K. B. 757; *affd.*, H. L., [1906] A. C. 428. Cp. *Malone v. Laskey*, [1907] 2 K. B. 141.

(*j*) See cases cited in note (*f*), *supra*.

(*k*) *Harris v. James*, 45 L. J. Q. B. 545; distinguishing *Rich v. Basterfield*, 4 C. B. 783, on the above ground.

(*l*) See *Lane v. Cox*, [1897] 1 Q. B. 415, per Lord Esher, M. R., and Lopes, L. J. The statement of the rule in *Nelson v. Liverpool Brewery Co.*, 2 C. P. D. 311, without this qualification is incorrect.

(*m*) *Gandy v. Jubber*, 5 B. & S. 78

(*revd.* on another point, 9 B. & S. 15); *Bowen v. Anderson*, [1894] 1 Q. B. 164. The liability in the case of the staircase leading to flats, referred to *infra*, may probably be put on the same ground.

(*n*) *Todd v. Flight*, 9 C. B. N. S. 377.

(*o*) *Lane v. Cox*, *supra*; *Copp v. Aldridge*, 11 T. L. R. 411. The tenant himself would in this case, of course, be in no better position than the stranger: see *Lane v. Cox*, *supra*.

(*p*) *Pretty v. Bickmore*, L. R. 8 C. P. 401. But was there not a control by the lessor here sufficient for liability?

(*q*) See *Gwinnett v. Eamer*, L. R. 10 C. P. 658, per Brett, J.; Pollock on Torts, p. 423 (7th ed.).

landlord's liability to strangers equally applies where—as in the case already mentioned (*r*) of a staircase leading to flats which is under his control—there is (not an express, but only) an implied obligation on his part to repair it as the sole means of access to the demised premises (*s*).

DIV. VI.—COVENANTS—(continued).

SECT. 4.—COVENANT TO INSURE.

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Nature and object.—The tenant usually enters into an express covenant to insure (*t*) the premises demised to him to the full (*u*), or to some specified (*x*), value, to keep them so insured throughout the term, to produce (*y*) upon request by the landlord his receipts for the premiums, to repay to him any sums (often made recoverable like rent by distress) which upon his own default the landlord may have expended in insurance (*z*), and in the event of damage or destruction by fire to apply the moneys received to the repair or re-instatement of the premises. The covenant is usually to insure either in a specially-named office or offices (*a*), or in such office as the landlord, or the landlord or his assigns, shall direct (in which case the direction must be given before liability can accrue) (*b*), or in some "respectable" (*c*) or "sufficient" (*d*) office at the tenant's option (*e*). Sometimes the covenant requires the insurance to be effected in the name of the lessor,—in which case it must be strictly followed (*f*); sometimes in those of the

(*r*) *Ante*, p. 145.

(*s*) *Miller v. Hancock*, [1893] 2 Q. B. 177.

(*t*) As to his liability in case of fire in the absence of the covenant, see *ante*, p. 150; and where there is a covenant to repair, *ante*, p. 221.

(*u*) *Doe v. Peck*, 1 B. & Ad. 428.

(*x*) *Doe v. Shewin*, 3 Camp. 134; *Heckman v. Isaac*, 6 L. T. 383.

(*y*) It is thought that this part of the covenant would be satisfied by readiness

to show on the demised premises themselves.

(*z*) *Doe v. Sutton*, 9 C. & P. 706.

(*a*) *Doe v. Peck*, and *Wilson v. Wilson*, *infra*; *Chaplin v. Reid*, 1 F. & F. 315.

(*b*) *Lillie v. Legh*, 3 De G. & J. 204; *Crane v. Batten*, 23 L. T. (O. S.) 220.

(*c*) *Doe v. Gladwin*, 6 Q. B. 953.

(*d*) *Doe v. Shewin*, *supra*.

(*e*) But subject often to the landlord's approval.

(*f*) *Penniall v. Harborne*, 11 Q. B. 368.

lessor and lessee jointly,—in which case an insurance in the name of the lessor alone is no breach (*g*), though one in the name of the lessee alone would be (*h*). Sometimes the lessee on effecting the policy is required to deposit it with the lessor (*i*).

In leases of public-houses, a very common covenant on the part of the lessee is to insure and keep insured the necessary licence of the premises; and where an obligation to that effect was entered into against "loss or forfeiture" it was held, on the construction of the whole instrument, that a non-renewal of the licence on the ground of the public-house not being necessary was a "loss" within the meaning of the covenant (*k*).

How broken.—The covenant binds the lessee to insure and keep insured every part of the premises during every part of the term. It does not mean that he must effect one policy and keep that policy on foot, but that he must always keep the premises insured by one policy or another, and it is a breach if they are uninsured at any one time (*l*). Two months' delay, for instance, after the execution of the lease—notwithstanding that the greater portion of the premises was covered during the interval by another policy—was held to constitute a breach, even though a new policy in strict conformity with the covenant was then effected (*m*); and even if the covenant ought, as it would seem, to be construed as giving the tenant a reasonable time to insure after the execution of the lease (or on the devolution of his estate (*n*)), the onus of accounting for any delay rests on him (*o*). So the covenant is broken on failure by the tenant to renew his policy within the time stipulated therein, even though the insurers may allow him to renew it afterwards and no damage has actually occurred (*p*).

The meaning of the covenant is that the lessee shall insure *for himself*, either in his own name or in that of a trustee (*q*), so that performance of a similar covenant by a person to whom he under-lets is not necessarily a performance of his own covenant (*r*). Hence, where a forfeiture was caused (*s*) by premises being

(*g*) *Havens v. Middleton*, 10 Hare, 641.

(*h*) *Doe v. Gladwin*, *supra*; *Hey v. Wyche*, 12 L. J. Q. B. 83; *Green v. Low*, 22 Beav. 625.

(*i*) See *Doe v. Peck*, *infra*.

(*k*) *Williams v. Lassell*, 22 T. L. R. 443.

(*l*) *Doe v. Peck*, 1 B. & Ad. 428.

(*m*) *Penniall v. Harborne*, *supra*,

followed in *Wilson v. Wilson*, 14 C. B. 616, where the delay was only of one month.

(*n*) *Doe v. Laming*, 4 Camp. 73.

(*o*) *Doe v. Ulph*, 13 Q. B. 204.

(*p*) *Doe v. Shewin*, 3 Camp. 134.

(*q*) *Logan v. Hall*, 4 C. B. at p. 623, per Maule, J.

(*r*) *Id.*, at p. 614.

(*s*) As to this, see p. 649, *post*.

uninsured after being underlet, the tenant failed, in the absence of a covenant of indemnity, to recover from his underlessee for the loss of his beneficial interest (though the underlessee had notice of the covenant in the head lease), as such loss was caused by his own breach of covenant (*t*).

Where a lease—after providing that the lessees should keep in repair the demised buildings and all new buildings and additions which might at any time be erected on or made to the premises, and that they should paint at certain fixed periods the outside of the demised premises and any additional buildings which might be so erected—imposed upon them the obligation at their own cost to insure, and at all times keep insured, all buildings, erections, and fixtures of an insurable character which “at any time during the term” might be erected, or placed, or fixed upon the premises, and no new buildings were erected after the commencement of the term, it was held that the covenant to insure extended to the buildings in existence at that time (*u*).

Re-instatement of premises.—A policy of fire insurance is a contract of indemnity (*x*); so that where a tenant, in pursuance of a covenant in his lease, re-instates premises which have been damaged by fire, the landlord cannot, as against his own insurers, retain moneys which have been paid to him on a policy effected by himself (*y*). Where the landlord insures he is not, in the absence of an express provision to the contrary (*z*), bound, upon a fire happening, to lay out the money he receives from his insurers in re-instating the premises (*a*); nor (as already stated (*b*)) does the fact of his having insured absolve the tenant from his liability to rebuild if he have covenanted to repair.

Insurance offices, however, are required to comply with the provisions of the 83rd section of 14 Geo. 3, c. 78, a section which, though contained in an Act applying for the most part only to the metropolis, has been held—but apparently with doubtful correctness (*c*)—to be itself of general application (*d*). This section provides that “upon the request of any person or persons

(*t*) *Logan v. Hall*, 4 C. B. 598. And cf. ante, pp. 231, 235.

(*u*) *Sims v. Castiglione*, W. N. 1905, p. 112.

(*x*) *Darrell v. Tibbitts*, *infra*; *Castellain v. Preston*, 11 Q. B. Div. 380; *West of England Fire Insurance Co. v. Isaacs*, [1896] 2 Q. B. 377.

(*y*) *Darrell v. Tibbitts*, 5 Q. B. Div. 560.

(*z*) *Edwards v. West*, 7 Ch. D. 858.

(*a*) *Leeds v. Cheetham*, 1 Sim. 146.

(*b*) *Ante*, p. 221.

(*c*) See *Westminster Fire Office v. Glasgow Provident Society*, 13 App. Ca. at p. 716.

(*d*) *Ex parte Gorely*, 4 D. J. & S. 477.

interested in or entitled unto any house or houses or other buildings"—trade fixtures, however, put up by a tenant, and removable by him (e), are not within these words (f)—which may be burned down or damaged, or on suspicion that the owner or occupier, or other person who has insured, has been guilty of fraud, or of wilfully setting fire to the premises, such offices shall cause the insurance money to be expended, as far as it will go, in rebuilding or repairing them. But such power is not to be exercised if the persons claiming the insurance money give, within sixty days of their claim being adjusted, sufficient security to the office to lay out the money on the premises themselves, or if within that time the money is settled and disposed of between the contending parties to the satisfaction of the office (g).

There seems no reason why the tenant, as a "person interested" in the premises, should not in such a case claim the benefit of this enactment (h). The landlord at all events—in the ordinary case where the insurance is by the tenant—can avail himself of it (i); but for this he must make a distinct request to the office—and before it has settled with the tenant—to apply the insurance money in rebuilding: a mere claim to be entitled to have the money paid to him, and not to the tenant, is not sufficient (k). Nor does the Act give the owner the right to rebuild and claim the money from the insurers, but requires the latter to rebuild themselves (k).

Damages.—The damages for breach of the covenant to insure are naturally different before and after the occurrence of a loss (l). Before loss the measure of damages, which is the loss to the landlord's reversion by the non-existence or lapse of the policy, is the cost necessary to put him into the same position as he would be in had the tenant performed his covenant. This seems to be the cost of entering into a policy, or (in the case of a lapse) the amount of the arrears of premiums, where the insurance can be effected at less expense in that manner (m). So where the landlord, upon

(e) *Post*, p. 696.

(f) *Ex parte Gorely*, *supra*.

(g) 14 Geo. 3, c. 78, s. 83. See *Wimbledon Park Golf Club v. Imperial Insurance Co.*, 18 T. L. R. 815.

(h) Neither in *Leeds v. Cheetham*, *supra*, however, nor in *Lofft v. Dennis*, 1 E. & E. 474, does any recourse appear to have been had to the help of the above statute.

(i) See *Vernon v. Smith*, 5 B. & A. 1.

(k) *Simpson v. Scottish Union Insurance Co.*, 1 H. & M. 618.

(l) The writ in the action may be indorsed as follows: "The plaintiff's claim is for damages for breach of a contract to insure a house": R. S. C. 1883, App. A., pt. III., s. 4.

(m) *Mayne on Damages*, p. 295 (7th ed.).

the tenant's default, keeps the insurance on foot himself, the measure of damages appears to be the amount of premiums he has paid (*n*). After loss, the measure of damages would be the exact value of the thing lost, which ought to have been insured (*o*).

In the case, already referred to (*p*), of the covenant to insure the licence of a public-house, the proper measure of damages after loss of the licence has been held to be the diminution in the value of the premises (*q*).

DIV. VI.—COVENANTS—(continued).

SECT. 5.—COVENANTS RELATING TO TRADE.

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II. THE NEGATIVE COVENANT.		<i>Damages and injunction</i>	259
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Covenants are often imposed on the lessee with the object of restricting the manner in which the demised premises shall be used. Of these the commonest are those with regard to trade; and they may be considered under two heads:—First, the *affirmative* covenant to carry on upon the premises a specified trade or business. Secondly, the *negative* covenant not to carry on there certain specified trades, or any trade or business at all.

83. (*n*) See *Hey v. Wyche*, 12 L. J. Q. B.

(*o*) *Mayne*, p. 297.

(*p*) *Supra*, p. 240.

(*q*) *Williams v. Lassell*, 22 T. L. R. 443.

(I) THE AFFIRMATIVE COVENANT.

The covenant to carry on a specified trade or business upon the premises is an ordinary covenant in leases of public-houses (*r*), but it is found also in other leases—*e.g.*, of premises demised for a workhouse (*s*) or a post-office (*t*). From the mere use, however, of a word indicating a particular trade (*e.g.*, hotel), in the description of the premises in the lease, a covenant of this kind will not, of course, be implied (*u*). A substantial (as distinguished from a literal) performance of such a covenant will be sufficient, and non-performance of it by act of law making it impossible will (as in all similar cases (*x*)) afford a good defence to an action for its breach (*y*). Where this covenant exists, *e.g.*, to carry on the business of a public-house, an injunction will not be granted to restrain its breach, for this would be equivalent to making an order requiring the tenant to carry on the specified business, *e.g.*, of an inn-keeper (*z*). If the covenant be framed negatively, to carry on no other than a specified trade or business (for instance, that of a theatre (*a*)), it will not, as already explained (*b*), be deemed equivalent to an affirmative covenant to carry on such business (*c*). Where a lessee of licensed premises covenanted not to carry on any other business than that of retailer of tobacco, wine, and beer to be consumed off the premises, with a proviso for re-entry in the event of ceasing to carry on such business, it was held that there was no implied obligation on him not to surrender the licence (*d*).

Sometimes the covenant binds the lessee to carry on a specified business in a particular manner. Instances of this may also be found in leases of public-houses, the lessee usually taking upon himself (1) to carry on his business in such a manner as not to cause forfeiture of the licence (no covenant to that effect being implied in such a lease (*e*)), and (2) (where, as frequently happens, he holds under brewers) to purchase all the beer used in his

(*r*) *Bennett v. Womack*, 7 B. & C. 627.

(*s*) *Doe v. Rugeley*, 6 Q. B. 107.

(*t*) *Wadham v. Postmaster-General*,
L. R. 6 Q. B. 644.

(*u*) *Grand Canal Co. v. M'Namee*, 29
L. R. (1.) 131.

(*x*) *Ante*, p. 135.

(*y*) *Doe v. Rugeley*, *supra*.

(*z*) *Hooper v. Brodrick*, 11 Sim. 47.

(*a*) *Croft v. Lumley*, 6 H. L. C. 672.

(*b*) *Ante*, p. 130.

(*c*) *Doe v. Guest*, 15 M. & W. 160.

(*d*) *Lacon v. Lacoby*, W. N. 1897,
pp. 39, 46. (Very shortly reported, but
probably an injunction was claimed.)

(*e*) *Maw v. Hindmarsh*, 28 L. T. 644.
Some observations on express covenants
of this kind by the C. A. in Ireland
(most of them perhaps of special applica-
tion to that country) will be found in
Brown v. Watson, [1904] 2 I. R. 218,
where an action was held not maintain-
able against a tenant's executrix.

business from them. In both these cases, however, it is obvious that the covenant is affirmative rather in form than in substance.

(1) Where the lessee, in undertaking to carry on the business of a public-house, covenants to abstain from any act which may "affect, lessen, or make void" the licence (*f*), or cause it to be "in any danger of being suspended, discontinued, or forfeited" (*g*),—such covenant is not broken by a conviction under the Licensing Acts, which, as a matter of fact, is not indorsed upon the licence; inasmuch as an undertaking of this kind cannot be held equivalent to a covenant not to commit any offence against those Acts (*h*). But a covenant not to do or suffer to be done on the premises any act by which the licence "may be forfeited" covers not merely the case where the licence is actually forfeited by the act of the tenant, but the case where it is brought in jeopardy by or in consequence of his act (*i*). And where such a covenant in the lease of a public-house was followed by another by which the lessee agreed to pay a stated sum of money to the lessor as liquidated damages in the event of the licence being lost, it was held that the latter undertaking was absolute, and covered the case where renewal was refused without any default on the part of the lessee (*k*). A covenant again by the lessee not to "imperil" the licence, and to use his best endeavours to extend the business of the house, is not broken by the mere fact of his ceasing to reside continually on the premises and conduct the business in person (*l*). But a covenant to use his best endeavours to continue the house open as a public-house will oblige the lessee, in the event of the licence becoming forfeited, to take some active step in the way of getting it restored (*m*). Where the tenant has entered into a covenant of the kind here described, an injunction will, in a proper case, be granted to restrain him from committing an act whereby the licence may become forfeited (*n*). But an undertaking to use demised premises as a public-house only, and not to carry on any other trade or business there, is not of course equivalent to an absolute covenant that the premises shall always remain licensed;

(*f*) *Wooler v. Knott*, 1 Ex. Div. 124, 265.

(*g*) *Fleetwood v. Hull*, 23 Q. B. D. 35.

(*h*) *Id.*, per Charles, J., at p. 39; *Wooler v. Knott*, *supra*, per James, L. J. Indorsements of convictions upon a licence are now done away with, all convictions of licensed persons for offences committed by them as such

being entered in the register of licences: 2 Edw. 7, c. 28, s. 9.

(*i*) *Harmann v. Powell*, 60 L. J. Q. B. 628.

(*k*) *Dalley v. Phillips*, 18 T. L. R. 18.

(*l*) *Moore v. Robinson*, 48 L. J. Q. B. 156.

(*m*) *Linder v. Pryor*, 8 C. & P. 518.

(*n*) See *Hooper v. Brodrick*, 11 Sim. 47.

nor, if the licence is lost, is such an undertaking broken by reason of the mere fact that the lessee has remained in possession of the house as a dwelling-house (o).

A covenant in the lease of a public-house that the lessee and his assigns would conduct the business in a proper manner so as to afford no ground for discontinuing the licences thereof, and would not wilfully do or suffer any act which might be a reasonable ground for the withdrawing or withholding of such licences, is not broken by the commission, by an assignee's undertenant, of an act in breach of the licensing laws, resulting in renewal of the licences being refused (p). For the conjunction of the two clauses—the first absolute, and the second qualified—of the covenant shows that (as they cannot reasonably be held to apply to the same thing) the first can only relate to the forfeiture of existing licences, as distinguished from their renewal; whilst an undertenant not being an assign within the meaning of the covenant (q), the act in question does not amount to the wilful doing of anything affording a reasonable ground for withholding the licences under its second clause (r).

But if the covenant be absolute throughout, the acts of an undertenant will be within its protection even without special mention; for to covenant absolutely that a thing shall not happen is to covenant that it shall not happen whoever does it (s). Hence, where a lessee for himself and his assigns covenanted that he would at all times during the continuance of the demise use and keep open the premises as a public-house, and so "conduct and manage the same as to afford no reasonable or lawful ground" for refusing to renew the licence, it was held that a conviction for breaches of the licensing laws by an assignee's undertenant, in consequence of which the value of the house as a licensed house was seriously diminished, was a breach of the covenant for which the lessee might be rendered liable (t).

And it is sufficient for this purpose to establish that there is in the instrument of demise an absolute covenant of which there has been a complete breach; so that an undertaking by lessees of a

(o) *Wilson v. Twamley*, [1904] 2 K. B. 99, per Romer and Mathew, L. J.J.

(p) *Bryant v. Hancock*, [1898] 1 Q. B. 716 (affd., [1899] A. C. 442).

(q) See *Villiers v. Oldcorn*, 20 T. L. R. 11 (cited *post*, p. 318); *Wilson v. Twamley*, *supra*, per Romer, L. J.

(r) *Bryant v. Hancock*, *supra*, per A. L. Smith, L. J. See too a similar explanation of the decision given by Collins, M. R., in *Wilson v. Twamley*, *supra*.

(s) Per Ridley, J., in next-cited case.
(t) *Mumford v. Walker*, 71 L. J. K. B. 19.

public-house that they would "at all times during the term keep and conduct the same in a regular and proper manner in every respect" is broken by the conviction of an undertenant of an offence against the licensing laws, by reason of which renewal of the licences was refused, though the lease contained a further proviso that the lessees should not "*knowingly or willingly* do or suffer any act" whereby that result might ensue (*u*).

On the other hand, a covenant not to do or "suffer to be done" on the premises any act whereby the licence might be endangered or lost has been held, in accordance with the principle already explained (*x*), not to be broken by mere proof of the commission of such an act by the servant of an undertenant, nor does it make any difference that the underletting, in breach of another covenant in the lease, may have been without the lessor's consent (*y*).

Where a lease (from brewers) of licensed premises, which, though used principally as an hotel, were demised, according to the intention of the parties, for the purpose of carrying on (amongst others) the business of a public-house, contained a covenant to keep the house "open in due and proper course of business *as an inn, tavern, or licensed victualling house* during the greatest number of days and the greatest number of hours that shall be allowed by law," it was held, on the construction of the whole instrument, that the italicized words were not intended to give a threefold option to the lessee, but were only words of description of the business generally which was to be carried on in the house; that in deciding what was a "due and proper course of business" regard must be had to the way in which an inn is ordinarily carried on; and that the exhibition upon the premises of a notice to the effect that no person would be served with refreshment on Sundays except visitors staying in the house and their guests and travellers, and that no person would be served with alcoholic drink more frequently than once during any morning or afternoon or evening on any day of the week, should consequently be restrained by injunction (*z*).

(*u*) *Paltherpe v. Home Brewery Co.*, [1906] 2 K. B. 5. Cp. *Prothero v. Bell*, 22 T. L. R. 370, cited *ante*, p. 131.

(*x*) See *ante*, p. 131.

(*y*) *Wilson v. Twam'ey*, [1904] 2 K. B. 99.

(*z*) *Dartford Brewery Co. v. Till*, 95 L. T. 636. It will be seen from the judgments of the C. A. that there was

a considerable difference of opinion on the question whether the act complained of was also a breach of a further covenant restricting the erection of placards or advertisements on the premises. Moreover, Moulton, L. J., seems to have thought that it was only the latter part of the notice that could be complained of as a breach of the other covenant.

(2) Where the lessee of a public-house covenants to purchase from his lessors all the beer he requires, the undertaking, though absolute in its effect (*a*), can only be enforced so long as the lessors supply him with beer (*b*) of good marketable quality (*c*), and of the kinds he requires for his business (*d*). And such a covenant is satisfied if the beer is actually supplied by the lessors, though (the purchase being effected through an agent) they have at the time no knowledge of its destination, and would have refused to sell if they had known it (*d*).

Considerable difficulty has arisen upon the question (which is one of construction) how far a covenant of this description is personal to the covenantees, and how far its benefit can be transferred by them to others (*e*).

A covenant to take beer from the lessors, "or their successors in their trade as brewers," extends only to persons who carry on the same business in the same place as the lessors (*f*); but where the covenant contains no reference to the beer which is to be provided being *made* by the lessors or their assigns, *e.g.*, when it stipulates that the lessee shall take all his beer from the lessors so long as they shall "deal in or vend such liquors," it is otherwise, and it will still bind the lessee though the assigns of the lessors carry on the business in another place (*g*). And a covenant by a publican in a lease to him from persons who are in fact brewers, though not so described in the lease, to purchase all beer, &c., together with other specified articles (not manufactured by them) which he should sell during the tenancy, from those persons or their successors in business, has the same effect (*h*). Where, however, in a lease from a person described as a brewer the lessee, in a string of covenants all clearly imposed for the protection of the lessor's business, entered into a covenant for himself and his assigns to deal, for all beer sold on the premises, "exclusively with the lessor

(*a*) *Hanbury v. Cundy*, 58 L. T. 155, cited *ante*, p. 156.

(*b*) As to the effect of an undertaking to supply it at a "fair current market price," see *Arnold Perrett & Co. v. Radford*, 17 T. L. R. 301.

(*c*) *Holcombe v. Henson*, 2 Camp. 391; *Cooper v. Twibill*, 3 Camp. 286, n.; *Luker v. Dennis*, 7 Ch. D. 227. The lessors may give evidence to show that they supplied beer to other customers which was not objected to, if proved to be of the same brew: *Manchester Brewery Co. v. Coombs*, 82 L. T. 347. As to the effect of an express provision permitting

the lessee to purchase elsewhere if the lessor fail to fulfil this obligation, see *Weaver v. Sessions*, 6 Taunt. 154.

(*d*) *Edwick v. Hawkes*, 18 Ch. D. 199 (reported as *Edridge v. Hawker*, 50 L. J. Ch. 577).

(*e*) The question is closely analogous to the one discussed later (*post*, p. 432 *et seq.*), relating to covenants running with the reversion.

(*f*) *Doe v. Reid*, 10 B. & C. 849.

(*g*) *Clegg v. Hands*, 44 Ch. Div. 503. See this case, *post*, p. 425.

(*h*) *Manchester Brewery Co. v. Coombs*, *supra*; [1901] 2 Ch. 608.

or his firm or his or their successors in business," and the reversion became vested in a firm of brewers, though the lessor's firm were still carrying on their business, it was held that there was no obligation on the lessee or his assigns to take their beer from the assignees of the reversion, so long as they continued to deal with the lessor's firm; and that having regard to the object of the covenant as above stated, it made no difference that the lease provided that *when the context allowed* the word "lessor" should include the assigns of the lessor (*i*). But where the lease of an hotel from a wine merchant contained a covenant by the lessee to take all foreign wines he might require for his trade from the lessor, his successors or assigns, and upon the lessor's death during the term his executors sold his wine business, it was held that an obligation, enforceable at the instance of the executors, lay upon the lessee and his assigns to continue taking their wines from the firm who had purchased that business (*k*).

A similar covenant is sometimes met with in other than public-house leases. Thus, where in a lease of lime-works the lessee covenanted to take and the lessor to supply from a specified colliery all the coals that might be required to carry on the business, it was held, upon such colliery failing to yield the full quantity, that the lessee was not entitled to resort elsewhere except for the deficiency (*l*).

(II) THE NEGATIVE COVENANT.

This covenant is expressed in a variety of ways, which are here considered as follows:—Not to carry on (1) any trade or business at all; (2) any of certain specified trades; (3) any noisome or offensive trade; (4) any trade or business which may be or become a nuisance or annoyance; and (5) to use the premises for private residence only.

(1) *Not to carry on a trade or business.*—The word "trade" imports buying and selling (*m*), while "business" is of wider purview (*n*) (including, for instance, such an occupation as keeping

(*i*) *Birmingham Breweries v. Jameson*, 67 L. J. Ch. 403.

(*k*) *White v. Southend Hotel Co.*, [1897] 1 Ch. 767. Cp. with this and the other cases of this class, *John Brothers, &c., Co. v. Holmes*, [1900] 1 Ch. 188.

(*l*) *Wight v. Dicksons*, 1 Dow, 141.

(*m*) *Doe v. Bird*, 2 A. & E. 161, per Lord Denman, C. J.

(*n*) *Rolls v. Miller*, 27 Ch. Div. 71, per Cotton, L. J.

a school (*o*) or carrying on a theatre (*p*), and is none the less business because no profits are made (*q*), or no payments (as in the case of a charity) even received at all (*r*), in respect of the transactions which are carried on. The same observation, too, applies to the words "occupation" or "calling" (*s*). A covenant not to "use" (or "permit to be used") the demised premises for any trade or business refers to that kind of user which has such trade or business for its object; the accident of something in the nature of business taking place there is not within the covenant (*t*). A covenant not to affix "any outward mark or show of business" means a mark *directed to the outside*, and will prevent the lessee from displaying his name and business, not merely upon a brass plate on the outside railings, but also upon an inside window-blind where the inscription faces the street (*u*). And a covenant not to paint or "write" any inscription, figure, or letter on the exterior walls of demised premises, or affix thereto any notice of trade or business, is not restricted to words written with a brush, and is broken by setting up in front of the premises words indicative of business inclosed in a metal frame attached by iron brackets to the wall (*x*).

(2) *Not to carry on specified trades.*—Like all restrictive covenants of the kind (*y*), this covenant will be construed strictly. An obligation, for example, not to carry on the trade of a "common brewer or retailer of beer" has been held not to be broken by carrying on the trade of a retail brewer (*z*). An obligation, too, not to carry on a particular trade or business is not the same as an obligation not to carry on *any part* of that trade or business (*a*). Hence, where a particular business is prohibited, the lessee may carry on another, though part of it is also part of the prohibited business (*b*). For this, however, he must *bonâ fide* carry on another business, for a mere colourable selling of other articles for the express purpose of not being considered to carry on the prohibited business will not protect him (*c*). And if the business he

(*o*) *Doe v. Keeling*, 1 M. & S. 95;
Kemp v. Sober, 1 Sim. N. S. 517.

(*p*) *Att.-Gen. v. Playhouse (Limited)*,
19 T. L. R. 580.

(*q*) *Bramwell v. Lacy*, 10 Ch. D. 691.

(*r*) *Rolls v. Miller*, *supra*.

(*s*) Per Jessel, M. R., in next-cited case.

(*t*) *Portman v. Home Hospital Association*, 27 Ch. D. 81, n., per Jessel, M. R.

(*u*) *Evans v. Davis*, 10 Ch. D. 747.

(*x*) *Att.-Gen. v. Playhouse (Limited)*,
supra.

(*y*) See *German v. Chapman*, 7 Ch. Div. 271, per James, L. J.; *Brigg v. Thornton*, [1904] 1 Ch. 386.

(*z*) *Simons v. Farren*, 1 Bing. N. C. 126.

(*a*) *Stuart v. Diplock*, 43 Ch. Div. 343.

(*b*) *Id.*; *Lumley v. Metropolitan Ry. Co.*, 34 T. L. 774.

(*c*) See *Stuart v. Diplock*, *supra*.

carry on be a mere branch of the prohibited business and nothing else, he commits a breach of the covenant (*d*). The mere fact, too, that he carries on a prohibited business only as ancillary to another business makes no difference to his liability (*e*).

Where a lease contained a covenant binding the lessees not to carry on the business of a licensed victualler or a keeper of a restaurant "similar to" that carried on upon adjacent premises which had already been demised as a fully licensed public-house by the same lessors, it was held that, the object of the covenant being plainly to protect the publican, a business carried on by assignees of the lease which seriously competed with his was within it, and that neither the fact that the demised premises enjoyed no licence nor that they presented an appearance dissimilar to that of the public-house made any difference (*f*). Such a covenant, however, does not prevent the carrying on of a business, in some of its details similar to that of the publican, by lessees who take the premises to the knowledge of the lessors for the express purpose of carrying it on; and their assignees may carry on such business also (*f*).

Sometimes the covenant further prohibits the sale of goods of a particular kind; and in that case it is broken if orders are received and goods exposed for sale on the premises, even though the sale be completed in, and the delivery made from, another place (*g*). So a covenant not to carry on, or be concerned in carrying on, either directly or indirectly, a specified trade, or sell any goods in any way connected with that trade within certain defined limits of distance, is broken by the covenantor selling goods as a journeyman in the employment of a person carrying on the specified trade within the prohibited limits (*h*).

In order to ascertain whether a particular trade or business is within the scope of the covenant, the meaning attached to the words at the date of the lease must be looked at (*i*). Hence, for example, a covenant forbidding the business of a "seller by retail of wines and spirits" does not prevent the sale by a grocer of

(*d*) *Doe v. Spry*, 1 B. & A. 617. So an undertaking in a lease of premises let for a club not to permit certain games to be played extends to a game which is merely a form or variety of one of them: *Fairtlough v. Whitmore*, 64 L. J. Ch. 386.

(*e*) *Buckle v. Fredericks*, 44 Ch. Div. 244; *Fitz v. Hes*, [1893] 1 Ch. 77. Cp.

Brigg v. Thornton, [1904] 1 Ch. 386, cited *infra*, p. 268.

(*f*) *Drew v. Guy*, [1894] 3 Ch. 25.

(*g*) *Doe v. Elsam*, Moo. & M. 189.

(*h*) *Jones v. Heavens*, 4 Ch. D. 636. The covenant in this case was by the lessor.

(*i*) *L. & N. W. Ry. Co. v. Garnett*, L. R. 9 Eq. 26, per James, V.-C.

wines and spirits in bottle under a statute passed subsequently to the lease, as such a sale could not have been within the contemplation of the parties (*k*). With a covenant forbidding the use of premises "for the sale of spirituous liquors," however, it is otherwise (*l*); but such a covenant intends a sale *to the public*, and is consequently not broken by the carrying on, by the lessees, of a club whose rules provide for the purchase of liquor and its distribution at fixed prices amongst the members (*m*).

The sale of beer by retail to be consumed off the premises is not prevented by a covenant not to use the premises as a beer-house (*n*), or as a public-house (*o*), these words having acquired a technical meaning (*p*). (It is, however, expressly provided by statute that a covenant by a tenant with his landlord not to use a house as a public-house, or carry on the trade of a victualler or publican (*q*), shall apply to every person licensed to sell beer, &c., under the Beer Act, 1830 (*r*).) So a covenant not to use premises as a public-house is, as it would appear, not broken by using them for a private hotel, in which the sale of liquor is confined to guests staying in the house (*s*). But a covenant not to use premises as a beer-shop (this word denoting any place where beer is sold by retail (*t*)) forbids the sale of beer therein altogether, whether to be consumed on or off the premises (*u*). Similarly, a covenant by a tenant against carrying on the trade of a "vintner" prevents him from selling wine to be consumed either on the premises (*x*)—such sale being also within a covenant against using the premises as a public-house (*x*)—or off the premises (*y*).

A covenant not to exercise certain specified trades implies that carrying on other trades is contemplated and not prohibited (*z*).

(*k*) *Jones v. Bone*, L. R. 9 Eq. 674.

(*l*) *Feilden v. Slater*, L. R. 7 Eq. 523 (reported as *Feilden v. Slater*, 38 L. J. Ch. 379).

(*m*) *Ranken v. Hunt*, 10 R. 249.

(*n*) *L. & N. W. Ry. Co. v. Garnett*, *supra*; *Holt v. Collyer*, 16 Ch. D. 718.

(*o*) *Pease v. Coats*, L. R. 2 Eq. 688.

(*p*) See *London and Suburban Land Co. v. Field*, 16 Ch. Div. 645.

(*q*) As to the scope of a covenant not to carry on the trade of a publican, see observations of Barton, J., in *In re Cullen*, [1904] 1 I. R. 206.

(*r*) 11 Geo. 4 & 1 Will. 4, c. 64, s. 31.

(*s*) *Devonshire (Duke of) v. Simmons*, 11 T. L. R. 52.

(*t*) See *London and Suburban Land Co. v. Field*, *supra*, per Cotton, L. J.

(*u*) *St. Albans (Bishop of) v. Battersby*, 3 Q. B. D. 359; *London and Suburban Land Co. v. Field*, *supra*; *Nicoll v. Fenning*, 19 Ch. D. 258. It may be added that a covenant in a conveyance forbidding the building upon the premises granted of "any beer-house or shop, or any hotel of less annual value than" a specified sum applies only to a beer-shop, and not to an ordinary shop: *Formby v. Barker*, [1903] 2 Ch. 539.

(*x*) 23 & 24 Vict. c. 27, s. 44.

(*y*) *Wells v. Attenborough*, 24 L. T. 312.

(*z*) *To-l-Heatly v. Benham*, 40 Ch. Div. 80, per Kekewich, J.; *Grand Canal Co. v. McNamee*, 29 L. R. (I.) 131.

A covenant, for instance, not to convert premises into a school does not imply a restriction against business of other kinds (*a*).

(3) *Not to carry on any offensive trade*.—In many leases the prohibition is restricted to “noisome or offensive” trades, or trades described by a similar epithet (*b*). The operation of such a covenant is not confined to trades which are in themselves necessarily offensive (*c*); for the question whether a trade is offensive (*d*) or not will depend to a great extent on the situation of the demised premises; and the fact that a particular trade was carried on there at the time of the demise goes far to show that it is not within the covenant (*e*). Nor does the fact that a trade is dangerous—and the circumstance that it greatly increases the risk of fire to the premises and makes an extra premium necessary for insurance renders it “dangerous” (*f*)—necessarily cause it to be an offensive trade (*g*). A covenant not to carry on a “noisy, noxious, dangerous, or offensive” trade has been held not to prevent the carrying on of a public laundry (*h*).

Where there is a covenant against carrying on an offensive trade, and an extra rent is reserved to the lessor in case such trade should be carried on, the lessee is not entitled to carry on such trade upon payment of the extra rent (*i*). A covenant against carrying on an offensive trade implies that carrying on a trade generally is not forbidden (*k*). In some leases certain trades are specified which the tenant may not carry on, and the words “or any other noisome or offensive trade” (or words to the like effect) are added (*l*); and when this is the case, such latter words may, by an ordinary rule of construction, be taken to intend a trade *ejusdem generis* with those specified (*m*). But this rule yields to a general intention to be collected from all parts of the instrument, and it will not be applied where, regard being also paid to the heterogeneous character of the trades enumerated as well as to all the surrounding circumstances, the plain object of the lease is to provide for the

(*a*) *Van v. Corpe*, 3 My. & K. 269.

(*b*) *E.g.*, *Hall v. Ewin*, 37 Ch. Div. 74; *Moses v. Taylor*, 11 W. R. 81; *Wiltshire v. Cosslett*, 5 T. L. R. 410.

(*c*) *Devonshire (Duke of) v. Brookshaw*, 81 L. T. 83.

(*d*) The meaning of this word in the present connection will be found discussed at length by the Irish C. A. in *Pembroke v. Warren*, [1896] 1 I. R. 76.

(*e*) *Gutteridge v. Munyard*, 7 C. & P. 129.

(*f*) *Teape v. Dowse*, 92 L. T. 319.

(*g*) *Hickman v. Isaacs*, 4 L. T. 285. Cf. *Lepla v. Rogers*, *infra*.

(*h*) *Knight v. Simmonds*, [1896] 1 Ch. 653. There was no appeal upon this point.

(*i*) *Weston v. Metropolitan Asylum District*, 9 Q. B. Div. 404; *ante*, p. 155.

(*k*) *Bonnett v. Sadler*, 14 Ves. 526, per Lord Eldon, L. C.

(*l*) See, for instance, *Tod-Heally v. Benham*, 40 Ch. Div. 80.

(*m*) See *Doe v. Bird*, 2 A. & E. 161; *Jones v. Thorne*, 1 B. & C. 715.

erection and maintenance of private residences (*n*). So where the covenant was against the carrying on of certain specified trades, or of any trade or business whereby "any injurious or offensive or disagreeable noise or nuisance" might be caused, the *ejusdem generis* rule was also discarded, and the establishment of a boys' school held to be forbidden (*o*).

A covenant, in the conveyance of a plot forming part of building land, not to carry on any trade which might be "in anywise injurious to the same land or any part thereof" has been held not to prevent a trade which only indirectly injured the property from its tendency to lower its general character as a residential estate, and, moreover, only to prohibit such a trade as might be injurious from its special nature or from the particular way in which it was carried on (*p*).

(4) *Not to do or permit acts to the annoyance of the lessor or the neighbours.*—In many leases the covenant is framed upon this model (*q*); and where such a clause immediately follows a clause prohibiting any offensive trade or business, it does not apply only to such acts as are not part of a trade or business, but includes also a trade or business if its exercise amount to an annoyance (*r*). Where the covenant was expressed to apply only to acts which might be a "nuisance," it was held to intend only a nuisance in the legal sense of the word (*s*); but the authority of this decision has been greatly shaken (*t*), and where, at all events, acts of "annoyance" are forbidden as well, any acts which in the minds of reasonable persons would amount to an interference with the ordinary comfort of existence (as distinguished from a mere fanciful feeling of distaste entertained by sensitive persons) will be a breach of the covenant, nor will it be necessary to show that any actual damage or pecuniary loss has been sustained (*u*). The feeling of danger, for instance, arising from the existence of a throat hospital has been held a good ground for relief without proof of actual risk of infection (*r*). So (under a covenant of this

(*n*) *Pembroke v. Warren*, [1896] 1 I. R. 76.

(*o*) *Wauton v. Coppard*, [1899] 1 Ch. 92.

(*p*) *Knight v. Simmonds*, *supra*. There was no appeal upon this point.

(*q*) See, for instance, *Bramwell v. Lacy*, 10 Ch. D. 691; *In re Davis*, 40 Ch. D. 601; *Seaward v. Paterson*, 12 T. L. R. 525, cited also *infra*, p. 258. And see a judicial construction of the covenant in

Gresham Life Assurance Society v. Ranger, 15 T. L. R. 454, where, however, the circumstances were somewhat special.

(*r*) *Tod-Heatly v. Benham*, 40 Ch. Div. 80.

(*s*) *Harrison v. Good*, L. R. 11 Eq. 338.

(*t*) See next-cited case.

(*u*) *Tod-Heatly v. Benham*, *supra*. Cp. *Wauton v. Coppard*, [1899] 1 Ch. 92, cited *supra*.

kind) the removal has been ordered of a large wooden screen erected close to the boundary line of two adjoining gardens by the tenant of one of them, the effect of which, amongst other things, was to interfere substantially with the access of light to the house of the other (*x*). But in a lease to traders of floors in a building situated in a purely business neighbourhood, the exhibition, across the front of the premises, of a large advertisement announcing an impending sale has been held not to amount to a breach of the covenant, for such covenant must be construed reasonably and with regard to the special circumstances of the case (*y*). And the fact that a trade is dangerous does not necessarily cause its exercise to be a breach of a covenant forbidding the carrying on of any business which should be "a nuisance or detrimental to surrounding occupiers" (*z*). But as it would seem, such a result may be held to ensue (*a*).

If the covenant entered into by the lessee be framed against annoyance to the lessor and the inhabitants of adjoining premises, it does not intend merely persons claiming under the lessor, but will include an annoyance to neighbouring inhabitants though not living on the lessor's property at all (*b*).

(5) *To use the premises for private residence only* (*c*).—The covenant is often made to contain a clause of this kind, generally in addition to a clause prohibitory of trade or business of one of the kinds just discussed; and when this is the case the covenant will be broken by not using the premises as a private residence, even though no trade or business is carried on (*d*). Such a covenant, for instance, will prevent the user of the demised premises as a school, whether a day-school or a boarding-school (*e*) (even though not carried on for purposes of profit but supported by public contributions (*f*)), as an art studio for instruction to pupils (*g*), or as an office for the receipt of orders for coal (*h*). It seems clear, too, that it will prevent, if not the letting of lodgings

(*x*) *Wood v. Cooper*, [1894] 3 Ch. 671.

(*y*) *Our Boys Clothing Co. v. Holborn Viaduct Land Co.*, 12 T. L. R. 344.

(*z*) *Lepla v. Rogers*, [1893] 1 Q. B. 31. (The point, however, was not disputed.) See at note (*g*), *supra*.

(*a*) See *Teape v. Douse*, 21 T. L. R. 271.

(*b*) *Tod-Heatly v. Benham*, 40 Ch. Div. 80.

(*c*) As to an implied obligation to this effect on the part of the lessor of a

building let in residential flats, see *infra*, p. 267.

(*d*) *German v. Chapman*, 7 Ch. Div. 271.

(*e*) *Wickenden v. Webster*, 6 E. & B. 387; *Johnstone v. Hall*, 2 K. & J. 414.

(*f*) *German v. Chapman*, *supra*.

(*g*) *Patman v. Harland*, 17 Ch. D. 353.

(*h*) *Wilkinson v. Rogers*, 12 W. R. 119, per Romilly, M. R. (The decision was reversed on appeal on another point: see note (*q*), *infra*.)

absolutely, at all events the carrying on the business of a lodging-house (*i*). On a somewhat similar ground, a covenant, in a conveyance of land for building purposes, to use the property erected as a private residence only, and not to carry on any trade or business there, has been held to be broken by the erection of a large block of residential flats (*k*). So it is a breach of a covenant not to use a house "for the purpose of any trade or manufacture, or for any other purpose than a private residence," to use it as a boarding-house for scholars attending a school in the neighbourhood kept by the covenantor; and the fact that the house is not to be advertised as a residence for pupils is immaterial (*l*).

The covenant in question, however, is not broken by a sale by auction of the furniture belonging to the house (*m*) (though it would be otherwise if furniture were brought on the premises for the purpose of being sold there (*n*)); but the lessee sometimes covenants expressly not to allow such sale, and when this is the case he commits a breach if a sale take place, provided it be shown to have been with his permission (*o*), as where it has taken place under a power so to sell upon default which has been given by him to a mortgagee under a bill of sale (*p*).

A covenant not to convert a dwelling-house into a shop does not intend necessarily a structural conversion of the premises, but may be broken by merely exhibiting goods for sale (*q*).

A covenant in the conveyance of land for building purposes that no buildings (*r*) should be erected except private dwelling-houses, and that no plots should be used for any purpose other than as gardens to such dwelling-houses, does not prevent the erection of such outbuildings (*e.g.*, stables) as are ordinarily appurtenant to private dwelling-houses; and if intended to be used for private purposes in connection with a dwelling-house, it makes no difference that such stables are erected before any dwelling-house exists (*s*).

A covenant in such a conveyance to erect not more than one dwelling-house, and to use it for a private residence only, is broken

(*i*) See per Lindley, L. J., in *Rolls v. Miller*, 27 Ch. Div. 71.

(*k*) *Rogers v. Hosegood*, [1900] 2 Ch. 388. See the case as cited *infra* for a description of the buildings contemplated.

(*l*) *Hobson v. Tulloch*, [1898] 1 Ch. 424.

(*m*) *Reeves v. Cattell*, 24 W. R. 485.

(*n*) *Id.*, per Jessel, M. R.

(*o*) *Toleman v. Portbury*, L. R. 5 Q. B. 288. See this case cited *ante*, p. 131.

(*p*) *S. C.*, L. R. 7 Q. B. 344.

(*q*) *Wilkinson v. Rogers*, 2 D. J. & S. 62.

(*r*) As to how far a wall may be a "building" within a covenant against buildings, see *Bowes v. Law*, L. R. 9 Eq. 636.

(*s*) *Blake v. Marriage*, 9 T. L. R. 569. Cp. *Russell v. Baber*, 18 W. R. 1021.

in the former as well as (in accordance with what has just been stated) in the latter of its branches by the erection of an ordinary block of flats, where the only portions of the building common to the occupiers are the hall, courtyard, entrances, and staircases (*t*). When, however, there are no words in the covenant to alter or cut down the popular interpretation of the word "house," as where it requires that not more than a specified number of houses, each being of not less than a specified value, shall be erected, a building only constitutes one house though it contain several residential flats within it (*u*). But where each of the floors forms in itself a complete tenement, and there is no internal communication between them (each having a separate front door), it is otherwise, for the case is then merely one of one house superimposed upon another with a horizontal division between them (*x*).

The word "building," in a covenant (in the grant of a portion of a residential estate) not to erect any buildings on the land other than private dwelling-houses of a certain value, is not necessarily confined to bricks and mortar; and such a covenant has been held to be broken by the construction of a railway embankment (*y*). But a covenant, in such a grant, that any "building" which should thereafter be erected on the land should be of a certain height and have a specified kind of front and roof, and be used only as a dwelling-house, merely stipulates that *if* a building in the nature of a house is erected it must be a house of a certain character, and is consequently not broken by the erection of a large wooden hoarding for the purposes of advertisement (*z*). So, where grantees of a portion of land described as suitable for the erection of private residences under a building scheme were subject to an obligation that no building other than a detached or semi-detached house should be erected, and buildings were being erected which answered in every respect the description of a private dwelling-house, it was held that the mere fact that it was proposed to use the premises when completed otherwise than as a private residence was no ground for an injunction restraining their erection, their character as private residential premises not being expressly made an essential part of the scheme (*a*).

(*t*) *Rogers v. Hosegood*, *supra*.

(*u*) *Kimber v. Admans*, [1900] 1 Ch. 412.

(*x*) *Ilford Park Estates v. Jacobs*, [1903] 2 Ch. 522.

(*y*) *Long Eaton, &c., Co. v. Mid. Ry. Co.*, [1902] 2 K. B. 574.

(*z*) *Foster v. Fraser*, [1893] 3 Ch. 158.

F.

See other like cases on sales there cited. And see also *Webb v. Fagotti*, 79 L. T. 683, where a covenant against any house being "built" for a public-house or for the sale in it of spirituous liquors was held to prevent a house from being so used whatever the purpose of its erection.

(*a*) *Wright v. Berry*, 19 T. L. R. 259.

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A covenant in a lease of land made exclusively for agricultural purposes, where the right was given to the lessee to erect the necessary buildings for residence, but not to "subdivide" the land in order to sell or let it for building, has been held to be broken by the issue of advertisements of a contemplated sale, accompanied by a plan in which the land was shown as laid out in lots for building and the land itself marked out accordingly; for the subdivision provided against was one preceding sale and not following it (*b*).

Where a lease contained a covenant not to use or suffer to be used the demised premises otherwise than for the purpose of a private club, an injunction was granted to restrain the giving of a boxing entertainment, advertised at a time when no club was in existence and with the object of assisting to form one, it being intimated that members might by payment obtain tickets for their friends, and that invitations to witness the proceedings were being issued to the press (*c*).

Licence of lessor.—Sometimes the covenant is so framed as to allow the carrying on of a trade or business if the licence (usually in writing) of the lessor be obtained (*d*). When this is the case the licence only extends to the particular occasion on which it is given (*e*); so that if given, for instance, in respect of one trade it will not afterwards apply to the carrying on of another, whether more or less offensive than the former (*f*). But a licence expressed in the terms that thereafter any trade (with certain specified exceptions) might be carried on upon the premises is not restricted to the person to whom it is addressed, but enures for the benefit of his successors by assignment (*g*). The mere fact, too, of a trade having been carried on for a number of years to the knowledge of the lessor, who has continued during that time to receive the rent, is evidence from which a licence on his part ought to be presumed (*h*). But in the absence of actual knowledge on the part of the lessor, the knowledge, in order that the presumption may

(*b*) *Short v. Turfontein Estates*, [1905] A. C. 584.

(*c*) *Seaward v. Paterson*, 12 T. L. R. 525.

(*d*) *E.g.*, in *Bramwell v. Lacy*, 10 Ch. D. 691; *Tod-Heathly v. Benham*, 40 Ch. Div. 80. As to the burden of proving the absence of licence, see *Tolman v. Portbury*, 1 L. R. 5 Q. B. 288, cited *post*, p. 317.

(*e*) Cf. 22 & 23 Vict. c. 35, s. 1; *post*, p. 276.

(*f*) *Macher v. Foundling Hospital*, 1 V. & B. 188.

(*g*) *Harman v. Ainslie*, [1908] 2 K. B. 241. (The decision was reversed on appeal, [1904] 1 K. B. 698, see *post*, p. 319, but this point was not affected.)

(*h*) *Gibson v. Doeg*, 2 H. & N. 615; *In re Summerson*, [1900] 1 Ch. 112, n.

arise, must be on the part of an agent whose acquiescence would bind him (i).

A covenant in a lease against carrying on, or permitting to be carried on, a trade or business without the licence of the lessor is naturally broken by granting an underlease containing a clause giving leave to the underlessee to carry on a specified business (k).

Damages and Injunction.—Damages (to be measured by the loss incurred by the reversion) may, of course, be claimed for the breach of this as of any other covenant (l); but in nearly every case the remedy sought is to have the breach restrained by injunction (m), a remedy which may be granted even though the lessor have sustained no injury from such breach (n). And sometimes this remedy will be granted even upon an interlocutory application (o); but for this both the covenant and its breach must be clear, or irreparable injury likely to arise (p). But it is well established that an injunction will only be granted in the case of breaches of a stipulation as to user of premises which is negative or restrictive in its real character, and such relief has, for instance, been refused in the case of a stipulation to build houses of not less than a specified value; for from such a stipulation (in the absence of any express provision as to the maintenance of the buildings when erected in their existing condition) a negative stipulation not to erect any buildings other than such houses cannot be implied (q).

The fact that the lessor of an estate let in parcels to different tenants (r) has parted with all his interest therein will not disentitle him to an injunction against a continuance of the breach by one of them, if he still has an interest in having the covenant enforced, as where he has himself entered into covenants with others of the tenants with regard to the nature of the business to be carried on upon the premises where the alleged breach has arisen: nor does it make any difference that the covenant sued on

(i) *Ashcombe v. Mitchell*, 12 T. L. R. 17, cited *infra*, p. 265.

(k) *Tritton v. Bankart*, 56 L. T. 306.

(l) *Lumley v. Metropolitan Ry. Co.*, 84 L. T. 774; *Jones v. Bone*, L. R. 9 Eq. 674, per James, V.-C.; *Nicoll v. Fenning*, 19 Ch. D. 258.

(m) *Barret v. Blagrove*, 5 Ves. 555; *Tod-Heathly v. Benham*, 40 Ch. Div. 80, and other cases cited above, *passim*. As to mandatory injunction, and the form in which it should now be expressed,

see *Jackson v. Normanby Brick Co.*, [1899] 1 Ch. 438.

(n) *Wells v. Attenborough*, 24 L. T. 312.

(o) Jud. Act, 1873, s. 25, sub-s. 8.

(p) *Wilkinson v. Rogers*, 2 D. J. & S. 62.

(q) *Holford v. Acton Urban Council*, [1898] 2 Ch. 240; cf. *supra*, p. 244.

(r) As in building schemes. See under next head.

is expressed to be made with him "as owner for the time being" of the property (*s*). But an injunction will not be granted against a tenant who has covenanted not to use for certain purposes any building which might be erected on the demised land merely because he has erected a building seemingly adapted for no other purpose (*t*).

By whom enforceable (*u*).—Where the owner of different plots of land which adjoin one another leases (*x*) them subject to restrictive covenants (*e.g.*, as to mode of construction or user of the premises) of the kind now under consideration—a thing which often happens when land is laid out for building,—it frequently becomes a question how far one of such lessees may enforce the covenant against another. Sometimes, however, the covenant of each lessee is directly with the other lessees as well as with the lessor (*y*). The general principle, already referred to (*z*), may be stated to be that such covenants do not enure for the benefit of one lessee against another (*a*), unless the right be expressly given to him by contract with the lessor (*b*), or unless such right can be implied as being intended from all the circumstances—the question is one of fact in each case—to be conferred upon him (*c*).

Where, for instance, the covenants are clearly imposed for the common advantage of all the lessees,—as where the lands are demised, not necessarily all at the same time (*d*), nor even subject to the same restrictions as to each part (*e*), but all as part of the same building scheme (*f*),—the lessees may enforce them *inter se* for their own benefit (*g*); nor is the mere fact that the lessor has not bound himself expressly to enforce them material (*h*). But the person against whom they are sought to be enforced must have

(*s*) *Spencer v. Bailey*, 69 L. T. 179.

(*t*) See *Worsley v. Swann*, 51 L. J. Ch. 576.

(*u*) The question of the enforcement of covenants generally as between lessor, lessee, and their respective assigns will be found discussed *post*, pp. 427—432.

(*a*) Most of the cases under this and the following head are cases not of leasing but of sale; but the principles are the same.

(*y*) See, *e.g.*, *Tait v. Gosling*, 11 Ch. D. 273; *Buckle v. Fredericks*, 44 Ch. Div. 244.

(*z*) *Ante*, p. 94.

(*a*) *Sheppard v. Gilmore*, 57 L. J. Ch. 6.

(*b*) *Renals v. Cowlishaw*, 9 Ch. D. 125, per Hall, V.-C.; *affd.*, 11 Ch. Div. 866.

(*c*) *Id.*; *Nottingham Patent Brick Co. v. Butler*, 15 Q. B. D. 261 (*affd.*, 16 Q. B. Div. 778); *Nalder, &c., Brewery Co. v. Harman*, 82 L. T. 594.

(*d*) *Nottingham Patent Brick Co. v. Butler*, *supra*; *Nalder, &c., Brewery Co. v. Harman*, *supra*.

(*e*) *Collins v. Castle*, 36 Ch. D. 243.

(*f*) *Spicer v. Martin*, 14 App. Ca. 12; *Mackenzie v. Childers*, 43 Ch. D. 265; *Brown v. Inskip*, O. & E. 231, Mathew, J.; *Tindall v. Castle*, 62 L. J. Ch. 555; *Davis v. Corporation of Leicester*, [1894] 2 Ch. 208.

(*g*) *Nottingham Patent Brick Co. v. Butler*, *supra*.

(*h*) *Id.*, per Lindley, L. J.

been a party to the scheme and able to enforce them against the others himself (*i*). And where an estate under such a scheme is disposed of in lots by successive transactions, a lessee or purchaser can only enforce them in respect of lots which are shown as laid out up to the date of his purchase or lease and as to which the restrictions are then defined, and not in respect of land retained by the lessor or vendor as to which no lotting is shown or stipulations published at that date (*k*). The lessee may also enforce them by obtaining an injunction against the lessor to prevent him from authorizing a subsequent lease free from the restriction: and this even without an express undertaking on the part of the latter to enforce them,—as where the conveyance contains a mere recital of intention that future lessees should be bound by them (*l*), or where the lease is taken on the faith of statements by the lessor that similar covenants obtain as to the whole land (*m*). Nor does the fact that the lessee's or purchaser's own conveyance contains a departure from such stipulations in itself prevent him from enforcing them, inasmuch as he is not entitled to the benefit of such departure himself (*n*). So, in the letting of flats in a building by an agreement obviously constituting part of a scheme for the management of the building for the benefit and convenience of the tenants generally, an undertaking will be implied on the part of the lessor not to alter the building by depriving it of its private residential character (as by turning it into a public hotel) (*o*), and a breach of such undertaking will be restrained by injunction (*p*). In such a letting, too, under a scheme of the above description, an express stipulation on the part of each tenant that he will not permit the premises let to him to be used for any immoral purpose can be enforced against the reversioner, where it can be shown that portions of the building are used for that purpose with his authority or assent (*q*).

Where, on the other hand, the covenants are merely imposed for the protection of the lessor,—as where he reserves a portion of the land for himself (*r*), or where the persons and the plots of land to be bound are quite undefined (*s*), or where the existence of the

(*i*) *Nalder, &c., Brewery Co. v. Harman*, *supra*.

(*k*) *Howell v. Satchell*, [1903] 2 Ch. 212.

(*l*) *Mackenzie v. Childers*, *supra*.

(*m*) *Spicer v. Martin*, *supra*.

(*n*) *Rowell v. Satchell*, *supra*.

(*o*) *Alexander v. Mansions Proprietary*, 16 T. L. R. 431.

(*p*) *Hudson v. Cripps*, [1896] 1 Ch. 265.

(*q*) *Jaeger v. Mansions Consolidated*, 87 L. T. 690.

(*r*) *Nottingham Patent Brick Co. v. Butler*, 16 Q. B. Div. 778, per Lord Esher, M. R.

(*s*) *Osborne v. Bradley*, [1903] 2 Ch. 446.

covenants and their binding effect upon the lessee against whom they are sought to be enforced have not even been known, at the time of his conveyance, to the lessee who seeks to enforce them (*t*), —the contrary holds good: as also where the existence of a definite building scheme cannot be established (*u*). The presence, however, of a clause or clauses permitting (at the instance of the grantor or anybody else) variation in the conditions (*x*), though a circumstance of great weight in showing that there is no building scheme binding the purchasers or tenants *inter se*, is not conclusive to that effect (*y*). The inference, too, that restrictive covenants may not, or may, be enforced by lessees *inter se*, based respectively on the fact of the lessor reserving, or failing to reserve, a portion of the land for himself, is one which may be rebutted by regard to the other circumstances of the case (*z*). And in the same way the inference derived from the ignorance, on the part of the lessee, of the existence of the covenants, which has just been alluded to, may also be displaced by showing that it was clearly the intention that the covenant should enure for his benefit (*a*).

The whole question, as has been explained in a recent case (*a*), is closely analogous to the one discussed hereafter (*b*) of covenants "running with the land." If the covenant in its inception "touches or concerns" the land of the party claiming its benefit, so as to be completely annexed to that land, it is capable of passing with it without proof of special bargain or representation with or to him, because he has acquired something which inhered in, or was annexed to, his land. In such a case it is not necessary to spell an intention out of surrounding facts, such as the existence, for example, of a building scheme (*c*). But where there is no indication in the original conveyance or in the circumstances attending it that the burden of the restrictive covenant is imposed for the benefit of the land reserved or any particular part of it, then it becomes necessary to examine the circumstances under which any part of the land reserved is disposed of, in order to see whether a benefit not originally annexed to it has become annexed

(*t*) *Keates v. Lyon*, L. R. 4 Ch. 218; *Master v. Hansard*, 4 Ch. Div. 718; *Renals v. Cowlishaw*, 9 Ch. D. 125; 11 Ch. Div. 868.

(*u*) *Tucker v. Fowles*, [1893] 1 Ch. 195; *Ashby v. Wilson*, [1900] 1 Ch. 90; *Graham v. Craig*, [1902] 1 I. R. 264.

(*x*) See, as to the effect of a clause of this nature, *Whitehouse v. Hugh*, [1906] 1 Ch. 253; *affd.*, C. A., 2 Ch. 283.

(*y*) *Osborne v. Bradley*, *supra*; *Hooper v. Bromet*, 90 L. T. 234, per Vaughan Williams, L. J.

(*z*) *In re Birmingham, &c., Land Co.*, [1893] 1 Ch. 342.

(*a*) *Rogers v. Hosegood*, [1900] 2 Ch. 388.

(*b*) *Post*, p. 417.

(*c*) *Rogers v. Hosegood*, *supra*.

to it on its disposal, so that the lessee is deemed to have acquired it with his land: and this can hardly be the case when he did not know of the existence of the restrictive covenant (*d*).

When there are mutual restrictive covenants by owners of land, their heirs and assigns, with the owners of adjoining land, their heirs and assigns, the subsequent lessee of one of the owners (as has been held) is entitled to the benefit of the covenants as an assign and can sue to restrain a breach (*e*). (On the other hand, as will be seen hereafter, the lessee of a person bound by a restrictive covenant may in general be restrained in like manner, whether assigns are mentioned or not (*f*).) Where in conveyances of different plots of an estate laid out for building, each lessee covenanted not to do certain specified acts without the consent of the lessor, "his heirs *or assigns*," it was held that the consent of the owner of the property for the time being (in whose hands a large portion of it still remained) was sufficient to entitle a lessee to commit one of such acts, and that the consent of all the lessees who acquired plots subsequently to the conveyance to him was unnecessary (*g*). And if a plot be afterwards subdivided, the owner of one part cannot enforce a restrictive covenant as against the owner (even though with notice) of another part (*h*).

Where land was conveyed in lots under a building scheme with a deed of mutual restrictive covenants, and a portion of it was afterwards conveyed in sub-lots under a sub-scheme with a deed of mutual covenants less restrictive in character than the former, it was held that *as between themselves* the owners of the sub-lots were governed by the sub-scheme only, and could not enforce the restrictions involved in the original covenants where more severe than those of the covenants to which they were directly parties (*i*).

Effect of acquiescence.—The right of the lessor, and—in those cases where it is open to him (*j*)—of the lessee, to enforce a restrictive covenant may be lost by acquiescence or delay. There are two classes of cases to be considered, according as the acts in breach of the covenant in respect of which the acquiescence is

(*d*) *Rogers v. Hoegood*, *supra*.

(*e*) *Tait v. Gosling*, 11 Ch. D. 273. Referred to as "a very special case": per A. L. Smith, L. J., in *Bryant v. Hancock*, [1898] 1 Q. B. 716 (affd., H. L., [1899] A. C. 442); see this case and *Villiers v. Oldcorn*, 20 T. L. R. 11, cited *supra*, p. 246.

(*f*) *Holloway v. Hill*, [1902] 2 Ch.

612; *Teape v. Douse*, 92 L. T. 319. See *post*, p. 425.

(*g*) *Eccerell v. Remington*, [1892] 3 Ch. 148.

(*h*) *King v. Dickeson*, 40 Ch. D. 596.

(*i*) *Knight v. Simmonds*, [1896] 1 Ch. 653. There was no appeal upon this point.

(*j*) *Supra*, p. 260.

alleged to have taken place are those (A.) of the person himself against whom it is sought to be enforced, or (B.) of other persons.

(A.) Here it is necessary to distinguish cases where knowledge of the breach has been acquired by the complaining party before the breach is complete from those where it is only acquired afterwards,—the former alone being cases of acquiescence in the strict sense of the word (*k*). If the lessor stands by while an act which constitutes a breach of the covenant is in progress and allows the lessee to incur expenditure in committing it, he thereby raises an equity against himself, and cannot afterwards be heard to complain, because he induces the person who commits the breach, and who might otherwise have abstained from it, to believe that he assents to it (*l*). Once, however, the breach is complete, a cause of action is vested in him; and if the knowledge of it only accrues subsequently, delay in enforcing the covenant is not acquiescence at all, and, if confined to the period allowed by the Statute of Limitations, will not in itself be a bar, although under the name of laches it may afford in some particular circumstances (*m*) a ground for refusing relief (*n*). This clearly applies where the alleged breach is a definite act committed once for all, *e.g.*, where the covenant in question is not to erect on the demised premises buildings of a certain kind or in a certain position. For acquiescence short of the statutory period to be in itself a bar in cases of this kind, it must be clearly shown that knowledge of the breach can be imputed to the complaining party at the time it was in progress; and if it only appears that he took no steps in consequence of it, and he has held out no inducement which has led to expense being incurred, he will not be disentitled to relief (*o*). Nor in such case will mere lapse of time prevent him from obtaining an injunction (*p*). But if knowledge of the breach has been acquired before the breach is complete, interference should be prompt, or the right to relief will be lost—each case, as regards time, depending of course upon its own circumstances (*q*).

(*k*) Per Lord Cottenham, L. C., in *Leeds (Duke of) v. Amherst (Lord)*, 2 Ph. 117.

(*l*) Per Thesiger, L. J., in *De Bussche v. Alt*, 8 Ch. Div. 286.

(*m*) *Gaskin v. Balls*, 13 Ch. Div. 324, may probably be referred to as an instance of this: the covenant in that case being subject to a proviso that it should not be personally binding except in respect of breaches committed during

the possession of the land to which it related.

(*n*) *De Bussche v. Alt*, *ubi sup.*

(*o*) *L. C. & D. Ry. Co. v. Bull*, 47 L. T. 413.

(*p*) See *Fullwood v. Fullwood*, 9 Ch. D. 176.

(*q*) Refer in illustration to *Patching v. Dubbins*, Kay, 1; *Coles v. Sims*, 5 D. M. & G. 1; *Kibbey v. Haviland*, 24 L. T. 353.

Where, however, the breach is one of a continuous character, *e.g.*, not to carry on a certain trade on the premises, failure for a certain period to take steps to restrain it, even though it may *in the beginning* have been committed without the knowledge of the lessor, may disentitle the latter to relief (especially where there has been anything like active encouragement by him of the breach), the reason appearing to be that in cases of this kind the lessee is allowed to continue incurring expense after such knowledge has been acquired (*r*). Here, again, naturally enough, no general rule as regards time can be enunciated (*s*); and though a mere protest or intimation of an intention to take proceedings may not be sufficient in itself to prevent the application of the above principle (*t*), it seems that, if followed within a reasonable period by such proceedings, the time by reference to which the alleged acquiescence must be tested is the time when such protest or intimation is made (*u*). In the application of the rule, the knowledge of a lessor's local agent will in general be the knowledge of his principal (*u*), provided evidence be forthcoming that he knew the acts in question to amount to a breach (*x*); nor can the lessor escape such application on the ground that, though aware of the breach, he was not aware of its full consequences, where the means of knowing such consequences can be imputed to him (*y*).

Acquiescence, again, in minor breaches will not prevent relief from those which are greater and more serious (*z*), even though the party applying for it has been himself guilty of breaches, if these are slight or trivial in character, and have upon objection made been discontinued before it is claimed (*a*). *A fortiori* will this result follow, where these latter breaches have been committed in respect of a covenant essentially different in nature as well as in importance from the one of which the breaches are objected to (*b*).

An amount of acquiescence less than that which would be required to be a bar to relief altogether may afford a ground, in

(*r*) *Sayers v. Collyer*, 28 Ch. Div. 103.

(*s*) Compare *Scarisbrick v. Tunbridge*, 3 Eq. Rep. 240; *Kelsey v. Dodd*, 52 L. J. Ch. 34; *Sayers v. Collyer*, *supra* (delay held a bar), with *Mitchell v. Steward*, L. R. 1 Eq. 541; *Northumberland (Duke of) v. Bowman*, 56 L. T. 773; *Devonshire (Duke of) v. Brookshaw*, 81 L. T. 83 (delay held no bar).

(*t*) *Scarisbrick v. Tunbridge*, *supra*.

(*u*) *Northumberland (Duke of) v. Bowman*, *ubi sup.*

(*x*) See *Ashcombe v. Mitchell*, 12 T. L. R. 17.

(*y*) *Willestire v. Cosslett*, 5 T. L. R. 410.

(*z*) *Richards v. Revitt*, 7 Ch. D. 224; *Osborne v. Bradley*, [1903] 2 Ch. 446.

(*a*) *Meredith v. Wilson*, 69 L. T. 336.

(*b*) *Chitty v. Bray*, 48 L. T. 860.

the discretion of the Court, for giving damages in lieu of an injunction (c).

(B.) Here the principle is that where material breaches of a covenant on the part of some of the lessees of portions of a property have been permitted without interference, neither the lessor nor the other lessees can subsequently enforce it, provided that the effect of such permission has been to substantially change the character of the property, so that the whole object of the covenant is at an end (d). For when equitable relief (as by injunction) is sought, equitable defences have to be considered; consequently not only the words of the covenant but the object to attain which it was entered into must be looked at, and if, owing to circumstances which have occurred since it was entered into, that object cannot be achieved, such relief will be refused (e). It makes no difference to the right of the party proceeded against to disregard the covenant, that the previous breaches were all committed before the execution by him of the deed in which he has undertaken to observe it (f).

It follows that if the previous breaches have all been trifling in extent and character, the covenant can still be enforced (g), even if they have been committed by the person seeking to enforce it himself (h). Nor of course is the mere failure to take proceedings against a person who has been guilty of acts, which render it doubtful whether a breach has been committed or not, such acquiescence as will prevent the right to restrain a subsequent breach (i). On the other hand, conduct of the party complaining which has amounted to active encouragement of previous breaches in other cases affords strong evidence of acquiescence (k).

The change in the general character of the property necessary to support the defence of acquiescence must, moreover, have taken place through the acts or permission of the party seeking to enforce the covenant or of his predecessors in title (l). There

(c) *Sayers v. Collyer*, 28 Ch. Div. 103, per Fry, L. J.; *Alexander v. Mansions Proprietary*, 16 T. L. R. 481.

(d) *Roper v. Williams*, T. & R. 18; *Bedford (Duke of) v. British Museum*, 2 My. & K. 552; *German v. Chapman*, 7 Ch. Div. 271, per James, L. J.

(e) *Knight v. Simmonds*, [1896] 2 Ch. 294, per Lindley, L. J.

(f) *Peck v. Matthews*, L. R. 3 Eq. 515.

(g) *Knight v. Simmonds*, *supra*; *Kilbey v. Haxland*, 24 L. T. 353.

(h) *Western v. MacDermott*, L. R. 2 Ch. 72. *A fortiori* where they are breaches of a covenant having no necessary connection with the covenant sought to be enforced: *Hooper v. Bromet*, 89 L. T. 37. (There was no appeal upon this point.) Cf. at note (b), *supra*.

(i) *Child v. Douglas*, Kay, 560.

(k) *Kelsey v. Dodd*, 52 L. J. Ch. 34.

(l) *Sayers v. Collyer*, 28 Ch. Div. 103.

must (as it has been put) be a personal equity against him arising from his acts or conduct in sanctioning or knowingly permitting such a change, so as to render it unjust for him to seek to enforce the covenant afterwards (*m*). Hence where, for instance, the departure from a restrictive covenant as to building has not affected the enjoyment by the complaining party of his portion of the property, there has not been such a permission, and consequently such a change, as is contemplated by the rule, and the principle does not apply (*n*). For mere passive acquiescence in one breach of covenant cannot be considered to be in itself a waiver for all future time of the right to complain of any other breach (*o*).

Where a restrictive covenant in a conveyance was entered into for the grantor's own personal benefit, and not for his benefit either in his capacity as owner of a particular property, or as a vendor reserving unsold property under a building scheme (with the intention of also benefiting other purchasers (*p*)), it was held that the allegation of a change in the whole character of the estate could afford no answer to its breach (*q*).

Covenant by the lessor.—Sometimes the lessor of land enters into a covenant restraining him from carrying on, or allowing to be carried on, certain trades upon adjoining land retained by him (*r*); sometimes the covenant is not to carry them on at all within a certain distance of the premises demised (*s*). And a covenant by the lessor in restriction of trade may even in some cases be implied, as where in leases of flats in a building the lessor took from the lessees a covenant to use them for residential purposes only, without any express correlative covenant as to the use of the flats on his part (*t*).

When the lessor has entered into such a covenant, the fact that the lessee has not objected to previous unimportant breaches of it will not, in accordance with what has just been stated, disentitle him to prevent a more serious one (*u*). Breach of the covenant by the lessor will be restrained by injunction (*x*); nor does it make

(*m*) *Craig v. Greer*, [1899] 1 I. R. 258.

(*n*) *Western v. MacDermott*, *supra*; *Patching v. Dubbins*, *Kay*, 1; *Brown v. Inskip*, C. & E. 231, Mathew, J.; *Jackson v. Winnifrith*, 47 L. T. 243.

(*o*) *Western v. MacDermott*, *supra*, per Lord Chelmsford, L. C.

(*p*) *Supra*, pp. 260—263.

(*q*) *Osborne v. Bradley*, [1903] 2 Ch. 446.

(*r*) See, e.g., *Richards v. Revitt*, 7 Ch. D. 224; *Stuart v. Diplock*, 43 Ch. Div. 343; *Holloway v. Hul*, [1902] 2 Ch. 612.

(*s*) *Jones v. Heavens*, 4 Ch. D. 636.

(*t*) *Gedge v. Bartlett*, 17 T. L. R. 43.

(*u*) *Richards v. Revitt*, *supra*.

(*x*) *Altman v. Royal Aquarium Society*, 3 Ch. D. 228.

any difference that he may have engaged to pay a stipulated sum as liquidated damages on each occasion of breaking it (*y*).

A covenant in a lease of property under a building scheme, not to "let" any house, or any land for the erection of any house, to be used as an hotel, within a certain distance from the premises demised, has been held to prevent the lessor and all those claiming under him from allowing any of the land to be used for the prohibited purpose (*z*). Where, however, a lessor, in the demise of a house intended to be used for a specified business, covenanted, but for himself only, not to let any other house belonging to him in the same street for the purpose of carrying on the same business, it was held that such covenant was not broken unless it could be shown that another house was so let for that purpose; and that the mere fact that such business was actually carried on there under a lease containing a covenant not to carry on any trade or business without the licence of the lessor was not sufficient, inasmuch as this latter covenant was one for the benefit of the lessor alone (*a*). On the other hand, where after a similar covenant the later letting was one made to enable the second lessee to carry on a substantial portion of the trade or business mentioned in the letting to the first, it was held that a breach had been committed in respect of which damages were recoverable against the lessor; but that as the covenant only restrained letting and not using the premises for the prohibited purpose, the first lessee, who had taken no steps to impeach the validity of the later letting, had no remedy against the second (*b*). Where again the owner of a certain number of houses covenanted in a lease of one of them that he would not let any of the others for certain specified trades, and subsequently let another, taking from the lessee a covenant to use it only for a specified trade other than the former, it was held that an action for the breach of such latter covenant by the second lessee was not maintainable by the first lessee against the lessor (*c*). But an absolute covenant by the lessor not to carry on by himself, or suffer to be carried on by others, a specified trade upon premises adjoining those demised, is of course broken by granting a lease of those

(*y*) *Jones v. Heavens*, *supra*.

(*z*) *Jay v. Richardson*, 30 Beav. 563. The distinction between this decision and that of the C. A. in the next-cited case seems fine.

(*a*) *Kemp v. Bird*, 5 Ch. Div. 974.

(*b*) *Brigg v. Thornton*, [1904] 1 Ch. 386.

(*c*) *Ashby v. Wilson*, [1900] 1 Ch. 66, where it is pointed out that in *Fitz v. Hes*, [1893] 1 Ch. 77 (referred to *supra*, p. 251), the point was probably not taken. On the appeal in that case the lessor was apparently not a party.

adjoining premises allowing the carrying on of such trade upon them (*d*).

Where the owner of a large block of buildings, the ground floors of which were let as shops unconnected with the upper parts, covenanted in a lease of one of the shops that he would not during the term permit any of the tenants of the "adjoining" premises, or of other parts of the house in which the shop demised was situated, to carry on a specified trade, it was held (*e*) that the covenant only extended to the premises *immediately* adjoining those which were the subject of the demise (*f*).

DIV. VI.—COVENANTS—(*continued*).

SECT. 6.—COVENANT NOT TO ASSIGN.

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(<i>b</i>) <i>Underletting</i>	279	<i>breach</i>	281

Nature and object.—A very common covenant in leases is one by which the lessee undertakes not to assign (*g*), or underlet, or part with the possession of, the premises demised to him, at least without the licence or consent (*h*) of the lessor. Even if the lease be made to the lessee, his executors, administrators, and assigns, such a covenant is not repugnant, the "assigns" being construed to intend such only as he may lawfully have (*i*). Where the lessee covenants only for himself, his executor (it has been so held) may assign after his death without committing a breach of the covenant (*k*); but in most cases the covenant is so framed as

(*d*) *Holloway v. Hill*, [1902] 2 Ch. 612. The lease contained a covenant forbidding the lessee's carrying on, without the lessor's consent, any trade except the trade in question.

(*e*) *Vale v. Moorgate Street Buildings*, 80 L. T. 487.

(*f*) Cp. with this case *Ind v. Hamblin*, 84 L. T. 168, C. A. (reversing decision below, 81 L. T. 779); and *White v. Harrow*, 86 L. T. 4, cited *ante*, p. 131.

(*g*) As to assignment generally, see *post*, pp. 411 *et seq.*

(*h*) As to the burden of proving the absence of consent, see *Toleman v. Portbury*, L. R. 5 Q. B. 288, cited *post*, p. 317.

(*i*) *Weatherall v. Geering*, 12 Ves. 504.

(*k*) *Seers v. Hind*, 1 Ves. 294; *Roe v. Harrison*, *infra*.

to cover the acts of his personal representatives as well as his own. And where a lessee covenanted on behalf of himself, his executors and assigns, it was held that alienation by his administrator was a breach as alienation by an "assign" within the terms of the covenant (*l*). But where a covenant, on the part of the lessee, his executors, administrators, and assigns, not to assign or underlet without the lessor's consent, with a proviso for re-entry on its breach, is contained in a lease, and the lessor gives his consent to an underlease, the underlessee is not, as between himself and the head lessor, bound by it, because the covenant by its terms is not broken (*m*) by a further assignment or underlease by him (*n*).

When this covenant exists, the landlord's consent must be obtained before an assignment or underlease may be made; nor will the mere fact that the landlord has not objected at the time to the assignee taking possession be held to amount to such consent (*o*). But the assignment itself will not, unless the lease be expressly made to be determinable upon its taking place and the lessor determine it accordingly (*p*), be invalid without such consent (*q*); and the assignee (and the same holds good to the extent already pointed out (*r*) in the case of an underlease) will be himself bound by the provisions of the lease (*s*) in the same way as if the assignment had been regular (*t*). As a rule a written consent or licence by the lessor is made necessary, and when this is the case a verbal consent will not of course suffice (*u*); but acquiescence for a number of years by a lessor who has continued during that time to receive rent with knowledge of the

(*l*) *More's case*, Cro. Eliz. 26. As to how far the covenant binds assigns generally, see *post*, p. 420.

(*m*) See *Villiers v. Oldcorn*, 20 T. L. R. 11, cited *post*, p. 318. The case seems clearly distinguishable from those hereafter dealt with (see p. 425, *post*), where an injunction to restrain the breach of a restrictive covenant as to user of land is granted against an underlessee.

(*n*) *Williamson v. Williamson*, L. R. 9 Ch. 729. (*In covenant*, of course, he could never be made liable: see *ante*, p. 138.) Consequently, if the lessor desires to exercise a control over future dealings with the property, he can in general only do so by making his licence for the underlease expressly conditional on the insertion therein of provisions restricting the underlessee from assigning, &c., without his consent, and re-

quiring the lessee to bind himself to enforce the restriction: 3 Byth. & Jar. Conv. 630 (4th ed.). Or he may make it a condition of the licence that he should himself be a party to the underlease, and that the undertenant should not assign or underlet without his consent: see *In re Spark*, [1905] 1 Ch. 456.

(*o*) *Elphinstone v. Monkland Iron Co.*, 11 App. Ca. 332.

(*p*) See *Re Johnson*, 70 L. T. 381.

(*q*) *Paul v. Nurse*, 8 B. & C. 486, per Holroyd, J.; *Williams v. Earle*, L. R. 3 Q. B. at p. 750, per Blackburn, J.

(*r*) See *ante*, pp. 137, 138.

(*s*) See *post*, pp. 415 *et seq.*

(*t*) *Silcock v. Farmer*, 46 L. T. 404.

(*u*) *Roe v. Harrison*, 2 T. R. 425; *Richardson v. Evans*, 3 Madd. 218.

circumstances is evidence from which a valid licence on his part ought to be presumed (x). As between him and a *third person*, however, founding a claim to such licence on acquiescence, the lessor does not lose the right of refusing his licence, unless he has acted in such a way as to make it fraudulent for him to set up that right (y).

But that right is not uncommonly controlled by a stipulation that such licence or consent shall not be withheld arbitrarily (z) or unreasonably. Such a stipulation, however (as ordinarily worded, e.g., "such consent not being unreasonably withheld"), does not amount to a covenant on the part of the lessor upon which an action will lie for unreasonably refusing his consent (a), or upon which (as it has been held) the lessee will be entitled to a declaration of his right to assign (b); but such refusal simply leaves the lessee at liberty to make the assignment or underlease without committing a breach of the covenant (c). Where, however, a licence to assign in such a case was granted, but subject to a condition providing for payment to the lessors of any future increase in rates which might be exacted from them in consequence of the assignment, a declaration was made at the instance of the lessee that (although not bound to give any reason for their refusal at all) they were not entitled to impose such a proviso as a condition of their consent, and that he was entitled to assign without further consent of any kind (d).

Similarly, where the undertaking is not to withhold consent to any assignment or underlease to a respectable or responsible person, and the proposed new tenant answers to that description, the lessor's consent need not be obtained (e); although it will be a clear breach of covenant if it be not applied for (f), even if (possession having been given) the arrangements for assigning or underletting be subsequently cancelled (g). So if the undertaking be not to withhold consent to an assignment to such a person "unreasonably," the lessor cannot withhold it on the mere

(x) See *Gibson v. Doeg*, 2 H. & N. 615.

(y) *Willmott v. Barber*, 15 Ch. D. 96.

(z) See *dicta* of Kelly, C. B., in *Treloar v. Bigge*, *infra*.

(a) *Ante*, p. 129.

(b) *Goodwin v. Saturley*, 16 T. L. R. 437. But see *at note (d), infra*.

(c) *Treloar v. Bigge*, L. R. 9 Ex. 151.

(d) *Young v. Ashley Gardens Properties*, [1903] 2 Ch. 112. Cp. *Jenkins v. Price*, [1907] 2 Ch. 229, where, however,

no costs were given, apparently on the ground that there was no cause of action apart from the declaration. See *Law Times*, vol. cccxiii., p. 223.

(e) *Hyde v. Warden*, 3 Ex. Div. 72; *White v. Hay*, 72 L. T. 281.

(f) *Barrow v. Isaacs*, [1891] 1 Q. B. 417. (*Burford v. Unwin*, C. & E. 494, *Huddleston, B.*, seems overruled.)

(g) *Eastern Telegraph Co. v. Dent*, [1899] 1 Q. B. 835.

ground that he wishes to occupy the premises himself (*h*); for the real object of the clause is only to protect the lessor from having his premises occupied in an undesirable way or by an undesirable tenant (*i*). But where a landlord, who had let part of a building (having only one entrance) subject to such a stipulation, occupied another portion himself, it was held that it was reasonable for him, before granting a licence to underlet, to ask for what purpose the part in question was to be used, and (he being a party to the underlease) to stipulate for a similar covenant between the underlessee and himself (*k*).

Having regard to the fact that the provision in question is one, as it would appear, for the benefit of the lessee and not of the assignee, it is thought that, in judging whether a refusal is reasonable or not, the conduct of the lessee during the negotiations is a material consideration, and that such conduct may disentitle him to a licence, although no objection could be raised against the proposed assignee in himself.

How far a stipulation of this kind will entitle a lessor to withhold his consent from an assignment to a company has not yet been definitely settled. If it be only not to refuse it in the case of an assignment to a respectable or responsible *person*, it seems clear that he will be entitled to refuse it when the proposed assignee is a company or corporation (*l*). Where the lessor's stipulation is in the wider terms not to withhold his consent "unreasonably," it is thought, in the case at all events of joint-stock companies—having regard especially to the curtailment of his rights of distress on the happening of a liquidation (*m*)—that he would be equally at liberty to refuse it (*n*). That he may do so at all events where the object of the proposed assignees is to obtain possession, not for the user of the premises contemplated by the lease, but for a merely collateral purpose, has been expressly decided (*l*). Where the stipulation was that consent should not be withheld "arbitrarily, or without good or sufficient reason," it was held that it might be refused to an assignment to a person whose tenancy, by reason of the objects for which it was designed,

(*h*) *Bates v. Donaldson*, [1896] 2 Q. B. 241.

(*i*) *Id.*, at p. 247, per A. L. Smith, L. J. But Kay, L. J., appears to have thought that such refusal might be reasonable if accompanied by an offer to purchase, at the price agreed upon with the assignee, the interest of the lessee.

(*k*) *In re Spark*, [1905] 1 Ch. 456.

(*l*) Per Romer, J., *Harrison v. Corporation of Barrow-in-Furness*, 63 L. T. 834.

(*m*) See *post*, p. 527.

(*n*) In *Jenkins v. Price*, *supra* (a decision on the Conveyancing Act: *infra*, p. 274), this ground was never taken by the lessor.

might affect the well-being of the whole estate of which the demised premises formed part (*o*).

As a general rule, however, where a stipulation of the above nature is found, a strong reason for a refusal on the part of the lessor must be shown, especially where a heavy rent is reserved by the lease (*p*). And it is now provided by statute (*q*) that "in all leases (*r*) containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent." It may be added that it is not unusual, especially in the case of leases by corporations, to find a covenant on the part of the lessee by which he undertakes that all assignments and underleases for which licence is given by the lessors should be prepared by their solicitor or other designated person (*s*); and sometimes the lessee agrees to pay a stipulated sum if he fail to fulfil the obligation (*t*). Not infrequently, too, he undertakes that any assignments or underleases shall be deposited with the lessors for registration (or written notice given to them containing information as to the proposed assignees or underlessees), and that a specified fee should thereupon be paid (*u*). In some leases assignments, &c., are only required to be produced to, or indorsed by, the lessor (*v*).

In providing that no fine or sum of money in the nature of a fine shall be payable for the licence of the lessor, the above enactment points to a sum of money which is to go irrevocably into his pocket (*x*). Hence it does not prevent him, as a condition of granting such licence, from requiring the lessee to deposit with him a named sum as security for the performance of the

(*o*) *Bridewell Hospital (Governors of) v. Faulkner*, 8 T. L. R. 637.

(*p*) *Sheppard v. Hong Kong Banking Corporation*, 20 W. R. 459; *Bates v. Donaldson*, *supra*, per Kay, L. J.

(*q*) 55 & 56 Vict. c. 13, s. 3.

(*r*) "Lease" includes agreement for a lease "where the lessee has become entitled to have his lease granted": sect. 5. See p. 666, *post*.

(*s*) *Haywood v. Silber*, 30 Ch. Div. 404.

(*t*) *Collett v. Young*, 33 W. R. 543.

(*u*) See form in Key & Elphinstone's *Precedents*, vol. i. pp. 730-1 (8th ed.).

(*v*) See Land Transfer Rules, 1903, r. 120.

(*x*) Per Lord Russell, C. J., in next-cited case.

obligations of the lease or agreement; for if they are performed the money will go back to him (*y*). But what may be the effect of the enactment in the event of the lessor, upon application being made to him, giving his consent to an assignment subject to the payment of a specified sum by the lessee (*z*) may perhaps be a question. For while it seems clear that if the money were not paid no action by him would lie to recover it, it is thought that (where he has the right of re-entry on breach of covenant) the analogy of the case where he has agreed not to withhold his consent unreasonably would be followed (*a*), and that having only clogged his consent with a condition which the law does not allow (*b*), no forfeiture in such case would be incurred by an assignment (*c*).

The term "fine," in the enactment under discussion, includes, not only a premium, but "any payment, consideration, or benefit in the nature of a fine" or premium (*d*). But whether the lessor may, as the price of his consent, exact a condition that the proposed assignee should enter into a covenant with him—not to pay any money beyond the rent reserved (*b*), but—merely to secure the rent and the performance of the obligations of the lease: or whether the true view is that no benefit or consideration capable of being regarded as money's worth may be required by him, must at present be regarded as doubtful (*e*). The effect, however, of the section is not to make the payment of a fine illegal, but only to read into the lease, as between the parties to it, a provision that no fine shall be payable for a licence; so that if a lessor require as the price of his consent that the assignee should make him a money payment, and he make it accordingly, he could not, being no party to the lease, afterwards sue to recover it back (*f*). Moreover, the Act (as it has been held) leaves the parties, during the running of the lease, free to make what bargain on the subject they please (*g*).

(*y*) *In re Cosh's contract*, [1897] 1 Ch. 9. In this case, however, the statutory definition of the word "fine," presently mentioned, does not appear to have been referred to.

(*z*) As, e.g., in *Griffith v. Young*, 12 East, 513.

(*a*) *Supra*, at note (*e*), p. 271.

(*b*) See *Jenkins v. Price*, [1907] 2 Ch. 229.

(*c*) See per Vaughan Williams, L. J., in *Waite v. Jennings*, *infra*.

(*d*) 44 & 45 Vict. c. 41, s. 2 (9). The Acts of 1881 and 1892 are to be

"read together": 55 & 56 Vict. c. 13, s. 1.

(*e*) In *Waite v. Jennings*, *infra*, Vaughan Williams and Stirling, L. JJ., without actually deciding the point, lean to the former view, and Moulton, L. J., to the latter, which, however, seems inconsistent with *In re Cosh's contract*, *supra*.

(*f*) See *Waite v. Jennings*, [1906] 2 K. B. 11.

(*g*) *Andrew v. Bridgman*, [1907] 2 K. B. 494 (reported as *Bridgman v. Andrew*, 23 T. L. R. 548). *Sed. qu.* See Law Times, vol. cxxiii., p. 223.

Where licence is necessary to alienate, the burden of obtaining it is on the lessee, and not on the proposed assignee or underlessee (*h*). Hence, where an intended sub-tenant was let into occupation on the terms of his effecting certain alterations in the premises, and the tenancy was defeated in consequence of the licence of the superior landlords not having been obtained, it was held that, in the absence of an express agreement to that effect, the intended sub-lessors could not recover from the sub-tenant the cost of restoring the premises to their original condition (*i*). If, however, the agreement to assign or sub-let be expressly made subject to the lessor's approval, the lessee is not bound (where the lessor has in terms agreed not to withhold his consent unreasonably) to take legal proceedings to obtain it (*j*). The assignee, on the other hand, must not, of course, any more than his assignor (*k*), take steps to prevent its being obtained (*l*); but the failure of the lessee to obtain it will entitle the assignee to annul the agreement, and after he has done so the lessee cannot procure such approval so as to bind him (*m*). It would seem that in the absence of special circumstances founded on conduct of the lessee and justifying the assignee in treating the lessor's refusal as final, the lessee has the interval until the date fixed for completion within which to obtain such approval, and that the assignee consequently cannot annul the contract before that time arrives (*n*).

Where a lease contained a covenant not to assign or underlet without the lessor's consent, and such consent having been obtained, an agreement was entered into by the lessee for an underlease, to contain similar covenants to those in the original lease, it was held that the consent to be made necessary therein was that not of the original but of the underlessor (*o*). But where the agreement for the underlease expressly stipulated that it should contain all usual covenants, including a covenant not to assign or underlet without the consent of the underlessor, together with such other covenants as were contained in the original lease (one of which was that the lessee should not assign or underlet without the consent of the lessor), it was held that the underlessee had bound himself not to

(*h*) *Lloyd v. Crispe*, 5 Taunt. 249; *Mason v. Corder*, 7 Taunt. 9; *Winter v. Dumergue*, 14 W. R. 281, 699; *Hilton v. Tipper*, 18 L. T. 626.

(*i*) *Fawkner v. Booth*, 10 T. L. R. 83.

(*j*) *Lehmann v. McArthur*, L. R. 3 Ch. 496.

(*k*) *Day v. Singleton*, [1899] 2 Ch. 320.

(*l*) *Davis v. Nisbett*, 10 C. B. N. S. 752.

(*m*) *Forrer v. Nash*, 35 Beav. 167.

(*n*) *Smith v. Butler*, [1900] 1 Q. B. 694.

(*o*) *Williamson v. Williamson*, L. R. 9 Ch. 729.

assign or underlet without the consent of both the original and the underlessor (*p*).

A licence to transfer the lease will entitle the lessee to part with the possession of the demised premises; and the fact of no formal assignment having been made makes no difference (*q*).

Where the lease contains a condition of re-entry (*r*) upon breach of the covenant not to assign or underlet without licence from the lessor, any licence so given extends (unless otherwise expressed) only to the actual assignment or underlease thereby specifically authorized, leaving intact all other rights and remedies of the lessor (*s*); and a licence similarly given to one of several lessees, or to assign or underlet part of the demised property, will not affect the lessor's right of re-entry upon breach of the covenant against the other lessees or in respect of the other parts (*t*).

If a licence to assign be once granted, neither the death of the lessor (*u*), nor the fact of his having parted with the reversion (*x*) before the assignment is made, affects the right of the lessee under the licence.

The covenant, as will be seen hereafter (*y*), is one that "runs with the land," and consequently binds any assignee in whose favour a licence may have been given. Nor does it make any difference to the necessity on his part of obtaining a further licence for a re-assignment that the person to whom he wishes to re-assign is the original lessee (*z*).

Acts amounting to breach.—As in every other case, the question whether the covenant has been broken or not depends on the language in which it is framed. The matter will best be considered under three heads, as an engagement by the lessee to abstain (without the lessor's consent) from (*a*) assigning, (*b*) underletting, (*c*) parting with the possession of the premises. The covenant is often so framed as to include all three kinds of alienation.

(*a*) *Assigning.*—In the first place, in order to amount to a breach of the covenant not to assign there must be an actual assign-

(*p*) *Haywood v. Silber*, 30 Ch. Div. 404.

(*q*) *West v. Dobb*, L. R. 4 Q. B. 634; affd., L. R. 5 Q. B. 460.

(*r*) As to this, see p. 316, *post*.

(*s*) 22 & 23 Vict. c. 35, s. 1 (in reversal of the rule in *Dunpor's case*, 1 Sm. I. C. 32). See *Eyton v. Jones*,

21 L. T. 789. And cp. 23 & 24 Vict. c. 38, s. 6, cited, *post*, p. 651.

(*t*) 22 & 23 Vict. c. 35, s. 2.

(*u*) Co. Lit. 52 b.

(*x*) *Walker v. Ballamie*, Cro. Jac. 102.

(*y*) *Post*, p. 420.

(*z*) *McEacharn v. Co'ton*, [1902] A. C. 104.

ment (*a*): the mere announcement, for instance, by the lessee of an intention to assign is not sufficient (*b*). Next, it must have been made by an instrument valid and effectual for the purpose (*c*), and not, for instance, by one void as an act of bankruptcy (*d*). And it must be an assignment *inter vivos*: alienation of the term even by a specific devise is no breach of the covenant (*e*), unless the undertaking expressly extend to this case (*f*). Nor is a mere agreement to assign (*g*), or an equitable assignment (as where a lease is deposited as a security for money lent) (*h*), within its scope, for there must be an alienation of the legal interest. So a declaration of trust by which the lessee undertakes to hold the demised premises in trust for a third party is no breach of the covenant not to assign,—a covenant which means not to make a *legal* assignment,—and this doctrine is in no way affected by the provisions relating to the full recognition of equitable interests (*i*) which are contained in the Judicature Acts (*k*). An ordinary mortgage, on the other hand, would be clearly within its operation (*l*); but the mortgage of a fixture, which though attached to the freehold (*m*) is by express agreement to remain the property of the tenant, has been held not to amount to a breach of the covenant creating a forfeiture, the tenant having full control over it during the term (*n*).

What the covenant forbids is assignment by voluntary act of the party: assignment *in invitum* by operation of law (*o*) is consequently no breach (*p*), for the covenant is not the same as a covenant to do no act whereby an assignment may result (*q*). Nor does it make any difference that the tenant may have been party to an act upon which an assignment in law is directly founded, as where he gave to a creditor a warrant of attorney to

(*a*) *Corporation of Bristol v. Westcott*, 12 Ch. Div. 461. As to the requisites of an assignment, see p. 412, *post*.

(*b*) *Gourlay v. Duke of Somerset*, 1 V. & B. 68.

(*c*) See *Holland v. Cole*, 1 H. & C. 67 (decided under a repealed Bankruptcy Act).

(*d*) *Doe v. Powell*, 5 B. & C. 308.

(*e*) *Fox v. Swan*, Sty. 482; *Doe v. Bevan*, 3 M. & S. 353, per Bayley, J. (*Berry v. Taunton*, Cro. Eliz. 331, is however to the contrary effect).

(*f*) *Parry v. Herbert*, 4 Leon. 5.

(*g*) *Horsey Estate v. Steiger*, [1899] 2 Q. B. 79.

(*h*) *Doe v. Hogg*, 4 D. & Ry. 226. The case *at nisi prius* is reported in 1

C. & P. 160, and (*sub nom. Doe v. Laming*) in Ry. & M. 36.

(*i*) See 36 & 37 Vict. c. 66, s. 24 (4).

(*k*) *Gentle v. Faulkner*, [1900] 2 Q. B. 267.

(*l*) *Dav. Prec. Conv.* vol. 2, pt. 2, p. 436 (4th ed.). So a mortgage by sub-demise is a breach of the covenant not to assign or underlet: *Serjeant v. Nash*, [1903] 2 K. B. 304.

(*m*) See *post*, p. 691.

(*n*) *Moss v. James*, 37 L. T. 715; *affd.*, 38 L. T. 595.

(*o*) See *post*, p. 441.

(*p*) See *Doe v. Bevan*, *supra*.

(*q*) See *Croft v. Lumley*, *infra*, per Lord Wensleydale.

confess judgment, upon which his term was taken in execution (*r*); provided that his *bonâ fide* object in doing so was merely to shorten the proceedings against him (*s*), and not to defeat the lessor's right to refuse his licence to an assignment by a collusive execution and sale (*t*). It follows from the above principle that if the demised premises be taken by a public company under their compulsory powers (*u*), or if the term be sold by the sheriff under an execution (*x*), or if the tenant become bankrupt (*y*), so that the term vests (*z*) *ipso facto* in his trustee,—in none of these cases is the covenant broken (*a*). Nor will the mere filing by the tenant of his own petition in bankruptcy, and consequent adjudication thereupon, amount to an assignment (*b*). The term, however, is often expressly made to determine altogether in the event of execution or bankruptcy (*c*).

An assignment by one of two lessees (partners in trade) to the other has been held to be a breach of the covenant not to assign (*d*). And though it has been doubted whether such an act is really within the covenant, as being in point of law not an assignment but a release (*e*), it has been subsequently held that as its effect is to destroy the privity of estate between the lessee who does it and his lessor, and so to affect the estate conveyed by the lease, such doubt is not well founded (*f*).

A covenant not to assign the land let or any part thereof without consent has been held to be broken where, the landlord having himself entered upon part, the tenant without his consent assigned over the remainder (*g*). But of a covenant not to assign "the premises" generally the assignment of a part of them only is no breach (*h*).

A covenant against assignment does not prevent the tenant from underletting (*i*), unless the words forbid an assignment for the whole or any part of the term (*k*). So a covenant not to

(*r*) *Doe v. Carter*, 8 T. R. 57.
 (*s*) *Id.*; *Croft v. Lumley*, 6 H. L. C. 672.
 (*t*) *Doe v. Carter*, 8 T. R. 300.
 (*u*) *Stippler v. Tottenham and Hampstead Ry. Co.*, L. R. 4 Eq. 112.
 (*x*) *Doe v. Carter*, 8 T. R. 57.
 (*y*) See *Wadham v. Marlow*, 4 Doug. 54.
 (*z*) 46 & 47 Vict. c. 52, s. 54. See *post*, p. 450.
 (*a*) So the word "assigns" in a covenant for the lessor and his assigns is as a rule confined to those who take by the voluntary act of the assignor:

Baily v. De Crespigny, L. R. 4 Q. B. 180.
 (*b*) *In re Riggs*, [1901] 2 K. B. 16.
 (*c*) *Post*, p. 819.
 (*d*) *Varley v. Coppard*, L. R. 7 C. P. 505.
 (*e*) *Corporation of Bristol v. Westcott*, 12 Ch. Div. at p. 465, per Jessel, M. R.
 (*f*) *Langton v. Henson*, 92 L. T. 805.
 (*g*) *Collins v. Silys*, Sty. 265.
 (*h*) *Grove v. Portal*, [1902] 1 Ch. 727.
 (*i*) *Crusoe v. Buggy*, 2 W. Bl. 766; *Church v. Brown*, 15 Ves. at p. 265, per Lord Eldon, L. C.
 (*k*) *Doe v. Worsley*, 1 Camp. 20.

assign "wholly or in part" any of the demised premises has been held not to be broken by the temporary letting, for a particular purpose, of a small portion of them (*l*).

(b) *Underletting*.—The question, on the other hand, whether, when the act forbidden is merely "letting" or "underletting" without consent, the tenant may assign is one of some uncertainty (*m*). If the covenant be not to let *for all or any part of the term*, assignment, which, as will be seen hereafter (*n*), is in effect an underlease for the whole term, is forbidden also (*o*). But it has now been held, by the Court of Appeal in Ireland, that where the covenant is simply not to "demise" the premises without the lessor's consent, assignment without such consent is no breach (*p*); and it would therefore appear that on a mere covenant not to underlet an assignment is not forbidden. As in the last case, a covenant not to underlet "the premises" demised is not broken by underletting a part of them only (*q*).

The word "underlease" in this covenant includes any letting, whether by deed or otherwise (*r*); and, similarly, a covenant not to let prevents an underlease (*s*). A covenant against underletting has been held broken by an agreement to underlet, if such agreement be enforceable between the parties (*t*); but not by the entry under the lessees of parties, not as tenants, but as purchasers whose purchase has not been completed (*u*). Letting lodgings or furnished apartments would seem to be a breach of the covenant against letting the premises or any part of them, at all events if the agreement be to give exclusive possession of the particular portion so let (*x*). So the covenant has been held to be broken by the entry of a third party under an arrangement for a business partnership with the tenant, by which the former was to have the exclusive use of a portion of the premises, and of the remainder jointly with the tenant; and this irrespective of whether the tenant received rent from the third party or not (*y*).

(*l*) *Mashiter v. Smith*, 3 T. L. R. 673. See on this case, *infra*, p. 281.

(*m*) See *Dev. Prec. Conv.* vol. 5, pt. 1, pp. 193-4 (3rd ed.).

(*n*) *Post*, p. 412.

(*o*) *Greenaway v. Adams*, 12 Ves. 395.

(*p*) *In re Doyle*, [1899] 1 I. R. 113.

(*q*) *Grove v. Portal*, *supra*; *Wilson v. Rosenthal*, 22 T. L. R. 233.

(*r*) *Timms v. Baker*, 49 L. T. 106 (a letting from year to year).

(*s*) *Roe v. Harrison*, 2 T. R. 425. The

words of the covenant here were "set, let, or assign over."

(*t*) *Eastern Telegraph Co. v. Dent*, 78 L. T. 713, per Kennedy, J.; *affd.*, C. A., [1899] 1 Q. B. 835. But cf. p. 277, *supra*.

(*u*) *Horsey Estate v. Steiger*, [1899] 2 Q. B. 79.

(*x*) *Greenslade v. Tapscott*, 1 C. M. & R. 55, per Parke, B. (*Doe v. Laming*, 4 Camp. 73, *semb. cont.*, is now of doubtful authority.) See *ante*, p. 8.

(*y*) *Roe v. Sales*, 1 M. & S. 297.

A covenant not to underlease any part of the premises for more than a year is not broken by making a lease for a year, though commencing *in futuro* (z).

An obligation couched in such wide terms as not to do or suffer any act whereby the demised premises or any part thereof should become vested, either for the whole or any part of the term, in any person or persons other than the lessees or their licensed assigns is, of course, broken by an underletting without the lessor's consent for a term however short (a).

(c) *Parting with the possession*.—This means—and the expression “parting with this indenture” has been deemed to be an exact equivalent (b)—to persons other than those to whom possession has been given by the lease (c). To amount to a breach of this covenant, evidence must be forthcoming to show that the possession has been parted with *by the tenant*; the mere fact that a stranger is in possession (seeing that he may be in by a trespass) is not sufficient (d). And, as in the cases of assignment and underletting, the tenant does not part with the possession of “the premises” if he only gets rid of the possession of a portion of them (e). Moreover, the mere act of letting other persons into possession by the tenant, and permitting them to use the premises for their own purposes, is not, so long as he retains the legal possession himself, a breach of the covenant (f). A covenant to use the premises only for the special purpose of residence, or for a special trade to be carried on by the lessee, is not broken by a mere agreement by him to underlet them subject to his being able to do so (g). Where the covenant by the lessee was not to suffer any part of the land to be occupied by any other person, allowing certain persons to occupy parts of the land for the purpose of raising a certain crop was held to be a breach, even though it was the custom of the country (to which the lessee was bound generally by his lease to conform) to do so (h).

(z) *Croft v. Lumley*, 6 H. L. C. 672.

(a) *Dymock v. Showell's Brewery Co.*, 79 L. T. 329.

(b) *Daly v. Edwardes*, 82 L. T. 372. The point is said to have been “conceded on all hands.” The words were “not . . . to assign, demise, or otherwise part with this indenture or any estate or interest therein for all or any part of the said term.” *Affid.*, C. A., 83 L. T. 548, and H. L. (*sub nom. Edwardes v. Barrington*), 85 L. T. 650.

(c) *Corporation of Bristol v. Westcott*, 12 Ch. Div. 461.

(d) *Doe v. Payne*, 1 Stark. 86. (*Doe v. Rickarby*, 5 Esp. 4, however, is to the contrary effect.)

(e) *Church v. Brown*, 15 Ves. at p. 265, per Lord Eldon, L. C.; followed in *Grove v. Portal*, [1902] 1 Ch. 727.

(f) *Peobles v. Crosthwaite*, 13 T. L. R. 37, 198; *Daly v. Edwardes*, *supra*.

(g) *Williams v. Cheney*, 3 Ves. 59.

(h) *Greenalade v. Tapscott*, 1 C. M. & R. 55. As to exclusion of custom by express stipulation, see *post*, pp. 719, 720.

To constitute (probably (*i*)) a breach of this covenant there must be a substantial parting with a substantial portion of the demised premises (*k*). Where, for instance, a tenant of certain lands allowed the owner of a travelling theatre, for a small weekly payment, to enter upon a field included in the demise, but continued to pay rates and taxes in respect thereof and to occupy all the rest of the land, it was held that no breach had been committed (*k*).

Damages and Injunction.—The measure of damages in an action for breach of the covenant not to assign seems to be such a sum as would put the landlord in the same position as if the covenant had not been broken (*l*); and it is to be observed that though the tenant's liability on the covenants of the lease does not as a rule (*m*) cease on assignment, the landlord might still suffer damage,—for instance, his right of distress might be worth much less to him. And where the tenant frees himself from liability by the assignment, as where he has himself come in by assignment (*n*), that sum has been held to be the amount which will (as far as money can) put the landlord in the same position as if he still had the tenant's liability, instead of that of a person of inferior pecuniary ability, to look to for breaches of covenant both past and future (*o*). Thus where one of two lessees committed a breach of the covenant by assigning without licence to the other (*p*), the damages held to be recoverable from him were the amount of rent and the value of the dilapidations which the latter was unable to pay (*q*).

Where, in breach of a covenant forbidding the lessee to assign or sub-let without licence, he sub-let with the knowledge that the sub-lessee intended to carry on a dangerous trade on the premises, it was held that liability for the full damage caused by a fire which was the probable result of the carrying on of such trade could be enforced against the lessee under the covenant (*r*).

Breach of the covenant not to assign, &c., without licence will be restrained by injunction (*s*); but the Court will not grant an

(*i*) See next note.

(*k*) *Mashiter v. Smith*, 3 T. L. R. 673. From the facts of the case and the terms of the judgment (which are both very shortly reported), it seems probable that, though the covenant is briefly referred to as one "not to assign," the real obligation alleged to have been broken was against parting with the possession.

(*l*) See per Blackburn, J., in next-cited case.

(*m*) See p. 162, *ante*.

(*n*) See *post*, pp. 427, 428.

(*o*) *Williams v. Earle*, L. R. 3 Q. B. 739.

(*p*) *Supra*, p. 278.

(*q*) *Langton v. Henson*, 92 L. T. 805.

(*r*) *Lepia v. Rogers*, [1893] 1 Q. B. 31.

(*s*) *McEacharn v. Colton*, [1902] A. C. 104; *Bridewell Hospital (Governors of) v. Fackner*, 8 T. L. R. 637.

interlocutory injunction unless the breach is clear or some irreparable injury is likely to be caused (*t*).

Div. VI.—COVENANTS—(*continued*).

SECT. 7.—COVENANT AGAINST WASTE (*u*).

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Nature and object.—Waste is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee simple or fee tail (*x*). It is either *voluntary*, by an act of commission, *e.g.*, pulling down a house; or *permissive*, by an act of omission, *e.g.*, suffering a house to fall for want of necessary repairs.

Leases (especially agricultural leases) often contain a covenant by the lessee not to commit waste, though it is perhaps more common to find in them stipulations against the commission of specific acts of waste, as, for instance, against lopping trees or breaking up pasture. The covenant is not, however, necessary, as it may be implied (*y*) as part of the obligation (*z*) to use the premises in a tenant-like manner; though a breach of this latter obligation does not, of course, necessarily amount to waste (*a*).

Where there is no covenant, liability for waste varies with the tenancy. Tenants for years are liable for permissive as well as for voluntary waste without a covenant or agreement to that effect or to repair (*b*); nor is liability for waste excluded by the fact that

(*t*) *Dyke v. Taylor*, 3 D. F. & J. 467; *Lord Mostyn v. Manger*, 17 T. L. R. 281.

(*u*) For the sake of convenience the whole of the doctrine relating to waste, so far as (affecting the relation of landlord and tenant) it is treated of in this work, is set out here, whether relating to the express covenant or not.

(*x*) 2 Black. Comm. 281.

(*y*) See *Whitham v. Kershaw*, 16 Q. B. Div. 613, per Lord Esher, M. R.

(*z*) *Ante*, pp. 149–153.

(*a*) *Harris v. Mantle*, 3 T. R. 807.

(*b*) Litt. s. 71; 2 Inst. 145; *Yellowley v. Gower*, 11 Exch. at p. 294, per Parke, B.; *Davies v. Davies*, 38 Ch. D. 499; notes to *Greene v. Cole*, 2 Wms. Saund. 644 (ed. 1871). (*Herne v. Bembow*, 4 Taunt. 764, *semb. cont.*)

they may have expressly entered into a repairing covenant, as the landlord's remedies upon the two obligations are cumulative (c). But a tenant *for life*, though liable for permissive waste if he be bound to keep the premises in repair (d), does not otherwise incur such liability towards the remainderman (e). A tenant at will, too, is not by the mere fact of the tenancy (f) liable for permissive waste (g), though if he commit voluntary waste his tenancy is *ipso facto* determined and trespass is maintainable against him (h); nor (as it has been said) is a tenant from year to year (i), though bound, as already mentioned (k), to do certain acts, by way of repair, for the preservation of the premises. And he also is liable for voluntary waste (l), even if committed while holding over after the determination of his tenancy (m). When a lessee is liable for waste he is liable by whomsoever it be committed, and *à fortiori* of course if authorized by him (n), for it is presumed that he had power to prevent it (o). And once an act of waste has been committed by him, the fact that he has power before the expiration of the lease to restore the premises to their former condition is immaterial (p).

What acts are waste.—No act can be waste which is not injurious to the inheritance; accordingly a covenant not to commit waste to a named value means waste producing an injury to the reversion of that amount (q). An act may be waste either by diminishing the value of the estate—substantially, for a mere nominal injury will not amount to waste (r),—or by increasing the burden upon it, or by impairing the evidence of title (s). Acts

(c) *Kinlyside v. Thornton*, 2 W. Bl. 1111; *Marker v. Kenrick*, 13 C. B. 188. Cp. *London (Mayor of) v. Hedger*, 18 Ves. 355, cited *infra*, p. 289.

(d) *Woodhouse v. Walker*, 5 Q. B. D. 404. In *In re Parry*, [1900] 1 Ch. 160, however (where this case was not cited), the estate of a tenant for life of leaseholds was held not to be liable to the remainderman for dilapidations due to non-observance of covenants to repair contained in the lease.

(e) *In re Cartwright*, 41 Ch. D. 532.

(f) See *Blackmore v. White*, [1899] 1 Q. B. 293, per Lord Russell, C. J.

(g) *Harnett v. Maitland*, 16 M. & W. 257; *Gibson v. Wells*, 1 N. R. 290; *Panton v. Isham*, 3 Lev. 359.

(h) Co. Lit. 57 a; *Lady Shrewsbury's case*, 5 Co. 13 b.; post, p. 597.

(i) *Torriano v. Young*, 6 C. & P. 8.

(k) *Ante*, p. 150.

(l) See *Martin v. Gilham*, 7 A. & E. 540, where the landlord, who had charged such tenant with voluntary waste, and proved only permissive, was held not entitled to recover. (Cp. *Edge v. Pemberton*, 12 M. & W. 187, the converse case.)

(m) *Burchell v. Hornsby*, 1 Camp. 360.

(n) *West Ham Charity Board v. East London Waterworks Co.*, [1900] 1 Ch. 624.

(o) 2 Inst. 145.

(p) *Queen's College v. Hallett*, 14 East, 489.

(q) *Doe v. Bond*, 5 B. & C. 855.

(r) *Harrow School (Governors of) v. Alderton*, 2 B. & P. 86.

(s) *Doe v. Burlington*, 5 B. & Ad. 507; *Jones v. Chappell*, L. R. 20 Eq. 539; *Tucker v. Linger*, 21 Ch. D. 18, per Kay, J.

which if injurious to the inheritance at all are so only by reason of one of the last two causes, but which really increase the value of the demised property, are known as *meliorating* waste (*t*). If the permanent character, too, of the property demised (it has been said) (*u*) is not substantially altered, it is not waste for the tenant to do things which within the covenants and conditions of his lease he is not precluded from doing (*x*); though where there has been such an alteration it is no answer for him to say that there will be a countervailing advantage to the landlord which will more than compensate him for the expense to which he has been put as the result of it (*y*). And where the lessor, in consequence of the acts of the tenant, has new conditions to comply with before he can use the land in the way in which he could have used it before, there has been an alteration in character within the meaning of the doctrine (*y*). But before a tenant can be made answerable for waste of this nature, it must be shown that the character claimed has been stamped on the property by the terms of the demise (*z*).

No act, moreover, is waste which is sanctioned by a prevailing local usage, unless the custom is excluded by the terms of the instrument of demise (*a*). And a tenant cannot as against his landlord be guilty of waste by the commission of acts which are expressly sanctioned by the terms of the lease (*b*). Nor can an omission to put premises into the same condition of repair as they had been put into by a named person amount to waste, as waste can only lie for that which would be waste if there were no stipulation respecting it (*c*).

Waste, too, can only be committed in respect of the thing demised; so that if the parcels contain "exceptions" (*d*), the lessee will not be liable for waste in respect of them (*e*), though he may incur an analogous liability if there be an express stipulation to that effect contained in the instrument of demise under which he holds (*f*).

(*t*) See *Doherty v. Allman*, 3 App. Ca. 709.

(*u*) *West Ham Charity Board v. East London Waterworks Co.*, [1900] 1 Ch. 624, per Buckley, J., at p. 636.

(*x*) It is thought that this principle is limited to waste in lands, and would not necessarily apply to waste in buildings. See *infra*, p. 285.

(*y*) *West Ham Charity Board v. East London Waterworks Co.*, [1900] 1 Ch. at p. 639.

(*z*) *Craig v. Greer*, [1899] 1 I. R. 258, per Holmes, L. J.

(*a*) Per Lindley, L. J., in *Dashwood v. Magniac*, [1891] 3 Ch. 306, cited *ante*, p. 151.

(*b*) *Moux v. Cobley*, [1892] 2 Ch. 253, per Kekewich, J.

(*c*) *Jones v. Hill*, 7 Taunt. 392.

(*d*) *Ante*, pp. 100—103.

(*e*) *Goodright v. Vician*, 8 East, 190.

(*f*) *Doe v. Price*, 8 C. B. at p. 904, per Wilde, C. J.

In buildings: (1) Voluntary.—Pulling down a house (*g*), even though it be rebuilt afterwards (*h*), or altering its internal construction to the injury of the lessor's reversion (*i*), as by turning two rooms into one, or a hall into a stable (*k*), is waste. So also is building a new house where there was none before (*l*), provided it be injurious to the inheritance (*m*); for the mere erection of buildings which improve the value of the land is not waste, and *a fortiori* if the lease itself shows that the erection of buildings was contemplated by the parties (*n*). In the same way it is waste to pull down or remove any part of a house, as the windows, doors, wainscot, benches, furnaces, or other such fixtures annexed to the house either by the landlord or tenant (*o*). Waste which ensues from the act of God (*e.g.*, caused by tempest) is excusable (*p*); and accidental damage or destruction in buildings caused by using them in a reasonable and proper manner, having regard to their character and the purposes for which it was intended they should be used, does not constitute waste (*q*). The lessee often covenants expressly not to erect any buildings (*r*) or make any alterations (*s*) in the premises without the licence of the lessor. A covenant in a lease of trade premises not to make without such licence any "alteration" to them applies only to alterations which affect the form or structure of the demised buildings, and cannot operate to prevent the tenant from doing acts (*e.g.*, affixing a large clock to the exterior of the wall by means of bolts driven into it) which, if not absolutely essential to the carrying on of his business, are usual and convenient for its proper and reasonable conduct (*t*).

(2) Permissive.—Suffering a house to be uncovered (*u*), or to remain uncovered after the roof has been removed by tempest, whereby the timbers become rotten (*u*), or allowing the walls to decay for want of paint or plaster (*x*), is permissive waste; but if

(*g*) Co. Lit. 53 a.

(*h*) 2 Ro. Ab. 815; *Smyth v. Carter*, 18 Beav. 78.

(*i*) *Young v. Spencer*, 10 B. & C. 145.

(*k*) 2 Ro. Ab. 815.

(*l*) Co. Lit. 53 a.

(*m*) Within one of the three causes mentioned *supra*.

(*n*) *Jones v. Chappell*, L. R. 20 Eq. 539.

(*o*) Co. Lit. 53 a; *Buckland v. Butterfield*, 2 B. & B. 54. As to fixtures, see *post*, pp. 690 *et seq.*

(*p*) Bac. Ab. Waste (E.).

(*q*) *Manchester Bonded, &c., Co. v. Carr*, 5 C. P. D. 507; *Saner v. Bilton*, 7 Ch. D. 815.

(*r*) See, *e.g.*, *Haigh v. Waterman*, 16

L. T. 375; *Poock v. Gilham*, C. & E. 104, Mathew, J.; *Wood v. Cooper*, [1894] 3 Ch. 671.

(*s*) See, *e.g.*, *Perry v. Davis*, 3 C. B. N. S. 769; *Eade v. Jacobs*, 3 Ex. Div. 335; *De Nicols v. Abels*, W. N. 1869, p. 14. In *Gresham Life Assurance Society v. Ranger*, 15 T. L. R. 454 (where the circumstances were somewhat special), the covenant was not to do anything which would "change or affect the external appearance" of the premises.

(*t*) *Bickmore v. Dimmer*, [1903] 1 Ch. 158.

(*u*) Co. Lit. 53 a.

(*x*) 2 Ro. Ab. 816.

the house be uncovered at the commencement of the tenancy, it is not waste if it be suffered to decay (*y*).

In lands: (1) Voluntary.—Digging up and removing soil from the surface (*z*), sowing the land with pernicious crops (*a*), ploughing up strawberry beds in actual bearing to the lessor's prejudice (*b*), inclosing and ploughing up common lands included in the demise (*c*), converting one kind of land into another (*e.g.*, arable land into wood (*d*), or meadow into arable (*e*)), are instances (*f*) of voluntary waste in lands. But it is not waste to divide a meadow by making ditches to draw off the water (*g*), nor to cut quickset hedges whereby they grow better (*h*), nor to take and sell flints turned up in ploughing, the removal of which from the land is necessary for good husbandry (*i*); although that which would not be waste without sale, if the sale be improper thereby becomes waste (*k*). So digging for gravel, lime, clay, brick-earth, stone, coal, &c., in mines or pits unopened at the date of the lease (except so far as is necessary to obtain materials to repair the house) is waste (*l*); but not if the mines were already opened (*m*), and have been worked by the authority of the reversioner with a view to commercial profit (*n*). Nor can this result ensue if they are expressly demised (*o*) with the land; though even where mines are expressly mentioned it would be waste to open new mines if there were mines already opened to which the words could refer, but not otherwise (*p*). It has already been stated (*q*) that the mere erection on lands of buildings which really improve the inheritance does not constitute waste in respect of which the lessee may be rendered liable (*r*). Whether the deposit of rubbish or other material on land so as to increase its height amounts to waste must be to a

(*y*) Co. Lit. 53 a. For other examples of waste, see 2 Ro. Ab. 814—818; Bac. Ab. Waste (C.).

(*z*) *Whitham v. Kershaw*, 16 Q. B. Div. 613; *Doe v. Morris*, 2 Taunt. 52.

(*a*) *Pratt v. Brett*, 2 Madd. 62.

(*b*) *Watherell v. Howells*, 1 Camp. 227.

(*c*) *Queen's College v. Hallett*, 14 East, 489.

(*d*) Co. Lit. 53 b.

(*e*) *Simmons v. Norton*, 7 Bing. 640, per Tindal, C. J. The pasture however must, it seems, be ancient: see Co. Lit. 53 b, note (B); *Goring v. Goring*, 3 Swanst. 661; *Murphy v. Daly*, 13 Ir. Com. L. R. 239.

(*f*) For others, see Bac. Ab. Waste (C.).

(*g*) Bac. Ab. Waste (C.).

(*h*) *Gage v. Smith*, Godb. 209.

(*i*) *Tucker v. Linger*, 21 Ch. D. 18, per Kay, J.

(*k*) *Id.*, explaining Co. Lit. 53 b.

(*l*) Co. Lit. 53 b.

(*m*) Co. Lit. 54 b; *Astry v. Ballard*, 2 Mod. 193.

(*n*) *Elias v. Griffith*, 8 Ch. Div. 521; affd., sub nom. *Elias v. Snowdon Slate Quarries Co.*, 4 App. Ca. 454.

(*o*) Co. Lit. 54 b; *Saunders's case*, 5 Co. 12 a.

(*p*) Co. Lit. 54 b; *Clegg v. Rowland*, L. R. 2 Eq. 160.

(*q*) *Supra*, p. 285.

(*r*) *Meux v. Copley*, [1892] 2 Ch. 253.

great extent a question of degree (*s*); and where during a lease the level of the soil was raised in this manner with the result of producing a substantial alteration in the nature of the thing demised (*t*), it was held that waste had been committed in respect of which an action was maintainable (*u*).

(2) Permissive.—Suffering a wall or bank built to exclude water from the demised premises to decay, whereby they become flooded and unprofitable, is waste (*x*); but if the flood be occasioned by the act of God it is otherwise (*y*). And to leave the demised land uncultivated is not waste (*z*), though it may be bad husbandry (*a*).

In trees: (1) Voluntary.—To cut down fruit trees (in a garden or orchard (*b*)) and trees which are esteemed timber—*i.e.*, oak, ash, and elm (*c*) in all places, and other trees in particular parts of the country by special custom (*d*)—is waste (*e*); and so is doing any act such as lopping timber trees in a manner which results in their decay (*e*). But it is not waste to cut down trees which are not timber, unless they are growing for the shelter of the house (*f*), nor to cut down trees (even timber trees) that are dead (*g*), nor to cut bushes (*h*) or underwood so long as the germins are not stubbed up or destroyed (*i*). Nor is it waste to cut timber to be used for necessary repairs to the house or to the gates and fences already existing on the demised land (*k*), provided such timber be required for use at the time of its being so cut (*l*); but it is waste to cut it for the use of mines, even though mines be expressly included in the lease, or though they were open at its commencement and the lessor had been in the habit of using the timber therein (*m*). The lessee is entitled to carry away trees, other than timber trees, which have been blown down by the wind (*n*).

(*s*) *West Ham Charity Board v. East London Waterworks Co.*, [1900] 1 Ch. 624, per Buckley, J., at p. 641.

(*t*) *Supra*, p. 284.

(*u*) See last-cited case.

(*x*) Co. Lit. 53 b.

(*y*) *Id.* Cf. *supra*, p. 285, at note (*p*).

(*z*) *Hutton v. Warren*, 1 M. & W. at p. 472, per Parke, B.

(*a*) Bac. Ab. Waste (C.).

(*b*) Co. Lit. 53 a.

(*c*) Of 20 years' growth: 1 Cruise, Dig. 116; *Aubrey v. Fisher*, 10 East, 446.

(*d*) *Dashwood v. Magniac*, [1891] 3 Ch. 306, where most of the cases on this subject will be found collected.

(*e*) Co. Lit. 53 a.

(*f*) *Id.*; *Phillipps v. Smith*, 14 M. & W. 589.

(*g*) Co. Lit. 53 a.

(*h*) See *Berriman v. Peacock*, 9 Bing. 384.

(*i*) Co. Lit. 53 a.; *Dunn v. Bryan*, Ir. R. 7 Eq. 143.

(*k*) Co. Lit. 53 b, 54 b. As to the tenant's duty to maintain the fences, see *ante*, p. 153.

(*l*) *Gorges v. Stanfield*, Cro. Eliz. 593.

(*m*) *Darcy (Lord) v. Askwith*, Hob. 234.

(*n*) *Herlakenden's case*, 4 Co. 62 a (followed in *Channon v. Patch*, 5 B. & C. 897). Windfalls of timber trees belong to the lessor: *id.*

(2) **Permissive.**—Where lands were let as a dairy farm and the landlord consequently knew that cattle were intended to be kept thereon by the tenant, the fact that the latter allowed young trees and shrubs in a meadow to remain unfenced so that the cattle injured them was held not to amount to waste (*o*). Nor would the circumstance of the trees having been excepted out of the demise make any difference (*p*).

Under the Agricultural Holdings Act.—The Agricultural Holdings Act, 1900 (*q*), contains a provision relating to waste to the effect that where a tenant who claims compensation for improvements (*r*) under the Act has wrongfully been guilty of waste, either voluntary or permissive, the landlord shall be entitled to set off sums due to him in respect thereof, and to have the amount assessed at the arbitration to which the tenant's claims are referred (*s*). It has been said, as regards the holdings to which the Act applies, that by reason of its provisions giving compensation for improvements, it goes "a long way towards getting rid of some of the old common law doctrines of waste" (*t*).

Damages and Injunction.—A covenant not to commit waste is not, with regard to the measure of damages for its breach, the same thing as a covenant to deliver up the property at the end of the term in the same state as that in which the tenant received it: the true measure of damages is the diminution in the value of the reversion (less a discount for immediate payment), and not necessarily the sum it would cost to restore the property to its condition before the waste (*u*). Vindictive damages, however, might be given in a case calling for them (*x*).

In lieu of, or in addition to, the lessor's remedy in damages, he may, in the case of voluntary (*y*) (but not in that of permissive (*z*)) waste, apply for an injunction to restrain the lessee from its further

(*o*) *Fowler v. Johnstone*, 8 T. L. R. 327.

(*p*) *Glenham v. Hanby*, 1 Ld. Ray. 739.

(*q*) 63 & 64 Vict. c. 50. As to the holdings to which the Act applies, see 46 & 47 Vict. c. 61, ss. 54, 61; *post*, p. 728.

(*r*) As to which, see pp. 726 *et seq.*, *post*.

(*s*) 63 & 64 Vict. c. 50, s. 2 (3), *post*, p. 737.

(*t*) *Meux v. Copley*, [1892] 2 Ch. 253, per Kekewich, J.

(*u*) *Whitham v. Kershaw*, 16 Q. B. Div. 613.

(*x*) *Id.*, per Bowen, L. J.

(*y*) *London (Bishop of) v. Web*, 1 P. Wms. 527; *Bathurst (Lord) v. Burden*, 2 Bro. C. C. 64; *Kimpton v. Eve*, 2 V. & B. 349; *Geast v. Belfast*, 3 Anst. 749, n.; *Pratt v. Brett*, 2 Madd. 62; *Hindley v. Emery*, L. R. 1 Eq. 52.

(*z*) *Powys v. Blagrave*, 4 D. M. & G. 448, per Lord Cranworth, L. C.; *Barnes v. Dowling*, 44 L. T. 809.

commission, a remedy which he may enforce also against an under-lessee (*a*). Nor will the fact that the waste complained of has been committed under a claim of right, and that acts of a similar nature have been suffered by him to take place unchecked during a long period, disentitle him to that relief (*b*). Where the circumstances require it the injunction may be obtained at once by means of an interlocutory order (*c*); though where the act of waste complained of is one of meliorating waste only (*d*), no injunction will, as a rule, be granted (*e*). The fact that the lease contains a covenant to repair and yield up in repair—of which specific performance is not decreed (*f*)—is immaterial (*g*).

Div. VI.—COVENANTS—(*continued*).

SECT. 8.—COVENANTS FOR WORKING THE DEMISED PROPERTY.

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These may be considered under two heads: (1) Covenants as to cultivation in agricultural leases; (2) Mining covenants.

(1) AGRICULTURAL COVENANTS.

Nature and object.—The implied covenant on this subject has already been referred to (*h*). But in agricultural leases it is usual to find a number of express covenants on the part of the lessee as to the manner in which the cultivation of the land is to be carried

(*a*) *Farrant v. Lovel*, 3 Atk. 723.
For an instance of a mandatory injunction, on breach of special covenant (referred to *supra*, p. 285) not to make alterations in the premises, see *Brocklesby v. Munn*, W. N. 1870, p. 42.

(*b*) *Courtown (Lord) v. Ward*, 1 Sch. & L. 8.

(*c*) Jud. Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 8.

(*d*) *Supra*, p. 284.

(*e*) *Doherty v. Allman*, 3 App. Ca. 709; *Grand Canal Co. v. M'Namee*, 29 L. R. (I.) 131; *Meux v. Cobley*, [1892] 2 Ch. 253.

(*f*) *Ante*, p. 228.

(*g*) *London (Mayor of) v. Hedger*, 18 Ves. 355.

(*h*) *Ante*, p. 150.

on. Such covenants are frequently introduced into leases for the purpose of defining and enforcing local usages as to the mode of cultivation; but sometimes they are made to differ from the prevailing "custom of the country," and then, as already explained, the custom is superseded by the covenant (*i*). For this, however, the inconsistency between them must distinctly appear: a custom, for instance, by which the tenant may remove and sell for his own benefit all flints turned up in the ordinary course of good husbandry, their removal being necessary for the proper cultivation of the land, is not superseded by an undertaking to cultivate on the most approved system of husbandry, and to allow the lessor liberty to take and carry away all minerals which have been reserved to him by the lease,—even assuming (*k*) such flints to be within the reservation (*l*).

It is to be observed that, after the end of the year 1908 (*m*), the effect of these covenants will be greatly modified, though not altogether extinguished, by the Agricultural Holdings Act, 1906 (*n*), presently referred to.

Some illustrations of such covenants are here subjoined; and others, in which certain rights are conferred and certain obligations imposed on tenants at the time of quitting their holdings, will be found in a future chapter (*o*). It may be added that sometimes the tenant is by the terms of his lease permitted to disregard a farming covenant upon paying an increased rent (*p*).

A covenant to manage pasture in a husbandlike manner is clearly broken by ploughing it up and so converting it into arable land (*q*). An undertaking by the tenant to manage a farm agreeably to the manner in which it had been managed by former tenants, though it gives him the same rights of enjoyment as they had (*r*), does not amount to a covenant that he will hold upon all the terms upon which those tenants held (*s*). A covenant to cultivate on a particular system according to the custom of the country has been held to be satisfied by the lessee cultivating in substantial compliance with the custom, and so far only as is *obligatory* by force of it (*t*). A covenant to cultivate a farm in a

(*i*) *Ante*, p. 152; and for a fuller discussion of the question, see *post*, pp. 719, 720.

(*k*) See *ante*, p. 103.

(*l*) *Tucker v. Linger*, 8 App. Ca. 508.

(*m*) See sect. 9 of next-cited Act.

(*n*) 6 Edw. 7, c. 56, s. 3 (1).

(*o*) *Post*, pp. 716 *et seq.*

(*p*) See *ante*, pp. 154—157.

(*q*) *Drury v. Molins*, 6 Ves. 328. Such an act, indeed, amounts to waste; see p. 286, *ante*.

(*r*) *Hood (Lord) v. Kendall*, 17 C. B. 260.

(*s*) *Liebenrood v. Vines*, 1 Mer. 15.

(*t*) *Newson v. Smythies*, 1 F. & F. 477.

husbandlike manner "according to the best rules of husbandry practised in the neighbourhood" is not broken by the erection on the arable land of glass-houses for the cultivation of hothouse produce,—at all events where it is shown that by reason of proximity to a large town other farms in the neighbourhood are conducted on the same principles of combining the farm proper with the market garden proper (*u*). A covenant properly to cultivate land, upon which no buildings are to be erected, applies to land which, after having been built upon with the consent of the lessors, is afterwards cleared of the buildings (*x*).

A covenant not to sow the land with more than two grain crops during four years applies to any four years of the term however taken, and not merely to each successive four from the commencement (*y*). But a covenant to lay on the premises two sets of manure within the last six years of the term, the latter of such sets to be laid within the last three years, is not broken by laying on both sets within the last three years (*z*).

A tenant, who has covenanted to permit his landlord during the last year of the tenancy to enter upon the farm and to sow certain seeds along with the tenant's own crops, does not commit a breach of his obligation by merely abstaining from giving the landlord notice of what crops he has sown (*a*).

Covenant not to remove produce.—The covenant not to remove produce, like hay, straw, and manure, from the demised premises is one which from the frequency of its occurrence demands separate consideration. How far it will, after the end of the year 1908 (*b*), be affected by the Agricultural Holdings Act, 1906 (*c*), will presently appear. It has already been mentioned (*d*) that, apart from custom, it would not at common law—at least as respects hay and straw—be implied as against the tenant. An undertaking not to remove manure from a farm means manure produced on the farm, and applies to all such manure, though made by cattle not belonging to the tenant, and fed by provender coming from elsewhere (*e*); nor is it an answer to an action for breach of such a covenant for the tenant to say that he has replaced the manure he has removed by other manure larger and better in quality (*f*). So an under-

(*u*) *Meux v. Copley*, [1892] 2 Ch. 253.

(*x*) *Hills v. Rowland*, 4 D. M. & G. 430.

(*y*) *Fleming v. Snook*, 5 Beav. 250.

(*z*) *Pownall v. Moores*, 5 B. & A. 416.

(*a*) *Hughes v. Richman*, Cowp. 125.

(*b*) Sect. 9 of next-cited Act.

(*c*) 6 Edw. 7, c. 56, s. 3 (1).

(*d*) *Ante*, p. 152.

(*e*) *Hindle v. Pollitt*, 6 M. & W. 529.

(*f*) *Legh v. Lillie*, 6 H. & N. 165.

taking not to remove hay, straw, or other dry fodder of the growth of the premises is not restricted to produce which can properly be spoken of as fodder, but applies even to hay unfit as food for cattle (*g*).

A covenant not to sell or remove from a farm during the last year of the term any hay, straw, or fodder which should arise and grow thereon prevents the tenant from removing during the last year hay, &c., which has arisen and grown at any time during the term and not merely during the last year (*h*). Similarly, an undertaking not to sell any hay, straw, or fodder grown or produced upon the farm applies to all straw grown on the farm during the tenancy, and prevents him from selling it even after the end of the term (*i*). And a covenant not to remove straw, &c., during the term will prevent its removal during such time after the end of the term as its prolongation lasts (*k*) for the purpose of allowing the lessee to exercise his tenant-right (*l*).

Frequently the tenant's undertaking is not to sell or remove hay or straw without returning to the land an equivalent in manure (*m*). Such a covenant does not bind the tenant while his tenancy endures to bring on the manure until after the hay or straw is removed; but after the expiration of the term a succeeding tenant may refuse to permit him to remove it till the manure has been brought, and such refusal will bind even a purchaser of the hay from the preceding tenant without notice of the covenant (*n*). Where a tenant undertook, in case of sale or removal of straw, to return the "value" of the straw so sold in manure upon the land, it was held that he was liable to return manure to the full value of the straw he had sold, and not merely to the value of the manure it would have made (*o*). A covenant by the tenant to consume all produce on the premises, and in case he remove any (which he is to be at liberty to do), for every ton removed to bring back within a specified time a ton of manure, is an alternative covenant, so that the landlord cannot recover for its breach unless he can show both the failure to consume the produce and the subsequent failure to bring back the manure, and he does not make a *prima facie* case by showing the former only (*p*).

(*g*) *Fielden v. Tattersall*, 7 L. T. 718. See also, as to operation of a covenant of this character, *Allen v. Berry*, 4 Bli. N. S. 520.

(*h*) *Gale v. Bates*, 3 H. & C. 84.

(*i*) *Massey v. Goodall*, 17 Q. B. 310.

(*k*) See p. 721, *post*.

(*l*) *St. Germain's (Lord) v. Willan*, 2 B. & C. 216.

(*m*) See *Cumberland v. Bowes*, 15 C. B. 348 (reported as *Cumberland v. Glamis*, 24 L. J. C. P. 46), and last-cited case.

(*n*) *Smith v. Chance*, 2 B. & A. 753.

(*o*) *Lowndes v. Fountain*, 11 Exch. 487, per Alderson, B. The Court in banc were equally divided on the point.

(*p*) *Richards v. Bluok*, 6 C. B. 437.

Covenants of the kind here spoken of relate, according to their proper construction, only to things which have an actual existence on the demised premises, and which can be dealt with actively or left passively for their benefit (*q*); so that the destruction of produce by accidental fire during the tenancy will excuse the lessee from liability for their non-observance (*r*).

Under stat. 56 Geo. 3, c. 50 (s).—The covenant in question—not to remove certain crops from the demised land but to consume them thereon for its benefit—has been made the subject of a special statute (*t*), which prevents a sheriff selling under an execution from allowing to be carried off from the land “any straw, threshed or unthreshed, or any straw of crops growing, or any chaff, colder, or any turnips, or any manure, compost, ashes, or seaweed, in any case whatsoever; nor any hay, grass or grasses, whether natural or artificial, nor any tares or vetches, nor any roots or vegetables, being produce of such lands, in any case where, according to any covenant or written agreement” with the landlord (communicated to the sheriff in writing before the sale) (*u*), “such hay, grass or grasses, tares and vetches, roots or vegetables, ought not to be taken” or removed from the land (*x*). But the sheriff may dispose of such crops or produce to any person who shall agree, in writing, with him to use them upon the lands in accordance with any covenant or written agreement which there may be to that effect in the demise, or (where no such covenant or written agreement exists) in accordance with the custom of the country (*y*). And the Act is not to extend to any straw, turnips, or other articles which the tenant may remove from the farm consistently with some contract in writing (*z*). Moreover, where a tenant is, by agreement or custom, prevented from removing “hay, straw, grass or grasses, turnips, or other roots, or any other produce of such lands, or any manure, compost, ashes, seaweed, or other dressings,” such disability extends to any purchaser of his goods, chattels, stock or crop, as well as to an

(*q*) Per Vaughan Williams, L. J., in next-cited case.

(*r*) *In re Hull and Meux (Lady)*, [1905] 1 K. B. 588.

(*s*) How far the provisions of this Act (which seems to have been lost sight of in the enactment next referred to) may be affected by those of that enactment will probably raise difficult questions when the latter comes into operation.

(*t*) 56 Geo. 3, c. 50. (On sect. 6 of this statute, see *post*, p. 505.)

(*u*) The tenant is to give such notice himself (together with the name and residence of the landlord), and the sheriff is thereupon to inform the landlord of the seizure: sect. 2.

(*x*) Sect. 1.

(*y*) Sect. 3. The section also gives power to the purchaser to occupy barns, &c., on the premises for the purpose of consuming the crops after the sale.

(*z*) Sect. 8.

assignee of his effects under a bill of sale, and to his trustee in bankruptcy (*a*); and this even where the latter has, under the powers vested in him by the Bankruptcy Act (*b*), disclaimed the lease (*c*). Although the title and preamble of the statute might be thought to indicate otherwise, a person buying directly from the tenant in the ordinary way (and not merely one buying under an execution from the sheriff) is a "purchaser" within this section (*d*). But the section only extends to purchasers from the *tenant*, and consequently not to cases where the landlord sells under a distress (*e*). The Act does not bind the Crown, and therefore its provisions need not be complied with when goods are seized under a writ of extent (*f*).

Effect of the Agricultural Holdings Act, 1906.—The Agricultural Holdings Act, 1906(*g*), which takes effect from 1st January, 1909 (*h*), has made great alterations in this branch of the subject. For it enacts (*i*) that "notwithstanding any custom of the country or the provisions of any contract of tenancy or agreement respecting the method of cropping of arable lands, or the disposal of crops, a tenant shall have full right to practise any system of cropping of the arable land (*k*) on his holding, and to dispose of the produce of his holding, without incurring any penalty, forfeiture, or liability: provided that he shall previously have made, or as soon as may be shall make, suitable and adequate provision to protect the holding from injury or deterioration, which provision shall in the case of disposal of the produce of the holding consist in the return to the holding of the full equivalent manurial value to the holding of all crops sold off or removed from the holding in contravention of the custom, contract, or agreement." But this enactment is not to apply "(a) in the case of a tenancy from year to year as respects the year before the tenant quits the holding or any period after he has given or received notice to quit which results in his quitting the holding; or (b) in any other

(a) Sect. 11, as modified by 36 & 37 Vict. c. 91.

(b) Cf. *post*, p. 451.

(c) *Lybbe v. Hart*, 29 Ch. Div. 8. Cp. *Schofield v. Hincks*, 58 L. J. Q. B. 147, cited *post*, p. 457.

(d) *Wilmot v. Rose*, 3 E. & B. 563.

(e) *Hawkins v. Walrond*, 1 C. P. D. 280; following *Ridgway v. Stafford*, 6

Exch. 404, and overruling *Abbey v. Peteh*, 8 M. & W. 419.

(f) *R. v. Osbourne*, 6 Price, 94.

(g) 6 Edw. 7, c. 56.

(h) Sect. 9.

(i) Sect. 3 (1).

(k) This expression does not include land in grass, which by the terms of any contract of tenancy is to be retained in the same condition throughout the tenancy: s. 3 (4).

case as respects the year before the expiration of the contract of tenancy" (l).

The Act goes on to provide (m) that "if the tenant exercises his rights under this section in such a manner as to injure or deteriorate the holding, the landlord shall, without prejudice to any other remedy which may be open to him, be entitled to recover damages in respect of such injury or deterioration at any time, and should the case so require to obtain an injunction . . . restraining the exercise of the rights under this section in that manner, and the amount of such damages may, in default of agreement, be determined by arbitration." It is thought, having regard to the wording of other clauses in the Act relating to the settlement of disputes by arbitration, that the reference of damages to arbitration under this clause is not compulsory, and that an action would be maintainable.

Damages and Injunction.—Subject to what has just been stated, upon the breach of a farming covenant damages may, of course, be claimed (n); and if the covenant be either expressly (*e.g.*, not to remove hay from the premises) or by implication (*e.g.*, to consume all hay upon the premises) negative in its character (o), its breach may be restrained by injunction (p). But a mandatory injunction will not be granted to compel a lessee to cultivate generally in a husbandlike manner (q), or to observe his positive covenants (*e.g.*, to keep a farm properly stocked) (r), inasmuch as this would be really giving specific performance of the covenant, a thing which cannot in such cases be done (s).

(2) MINING COVENANTS.

A few remarks of a general character (t) are appended upon covenants in a lease of mines for their proper working by the lessee. A covenant to work a mine in a proper and workmanlike

(l) Sect. 3 (1).

(m) Sect. 3 (2).

(n) See *Willson v. Love*, [1896] 1 Q. B. 626 (cited *ante*, p. 156), where upon breach of a covenant not to sell hay off the premises the manurial value of hay so sold was held to be the proper measure of damages. The writ in the action may be indorsed as follows: "The plaintiff's claim is for damages for breaches of covenants contained in a lease of a

farm": B. S. C. 1883, App. A., pt. III., s. 4.

(o) *Phipps v. Jackson*, 56 L. J. Ch. 550, per Stirling, J.; *Crosse v. Duckers*, 27 L. T. 816.

(p) *Grey v. Saxon*, 6 Ves. 106.

(q) *Musgrave v. Horner*, 31 L. T. 632, per Jessel, M. R.

(r) *Phipps v. Jackson*, *supra*.

(s) *Rayner v. Stone*, 2 Eden, 128.

(t) See note (i) at p. 102, *ante*.

manner (*u*) is an absolute covenant, and will oblige the lessee to work it even at a loss (*x*), though not necessarily to work it continuously (*y*); but if the covenant be qualified, *e.g.*, to work "so long as the mine is fairly workable" (*z*), or "to the fullest practicable extent consistent with the means of sale" of the produce (*a*), it is otherwise. So a covenant to work a coal mine "in the best and most effectual manner, to the best advantage, and according to the common mode and usual practice of carrying on all coal works or collieries with effect," is fulfilled by following the common mode and usual practice, whether that be the best possible mode of working or not (*b*).

A covenant, again, to sink shafts in a mine is also an absolute covenant (*c*), but it may of course be qualified by the addition of words which will prevent the lessee from having to work the mines and get the coal at a loss (*d*). Where a minimum or "dead" rent (*e*) is reserved, to be increased by royalties upon getting the coal, &c., beyond a certain amount, with a covenant by the lessee to work the mine "efficiently," he will not be entitled, upon payment of such rent, to abstain from working, or even to work only up to the amount of the minimum rent (*f*). And where in a mining lease the rent was made to depend on the quantity of coal raised and to be payable quarterly, it was held that from a covenant to work the mine in a fair and proper manner an undertaking to work it immediately and continuously could be inferred (*g*). For in a covenant of this kind, *e.g.*, to work mines "fairly, duly, and honestly," the qualifying words are inserted for the benefit, not of the covenantors, but of the covenantees (*h*).

Where in a demise of mines which had been or which during the demise should be opened under certain lands, the lessee covenanted to work them in a proper and workmanlike manner, it was

(*u*) See *Lewis v. Fothergill*, L. R. 5 Ch. 103.

(*x*) *Jervis v. Tomkinson*, 1 H. & N. 195. As to exemption in case of "unavoidable accident," see *Morris v. Smith*, 3 Doug. 279, and of "exhaustion" of produce, *Mellers v. Duke of Devonshire*, 16 Beav. 252.

(*y*) *Jegon v. Vivian*, L. R. 6 Ch. 742.

(*z*) *Jones v. Fhears*, 7 C. & P. 346; *Cartwright v. Forman*, 7 B. & S. 243, at p. 247, per Cockburn, C. J., disapproving *Griffiths v. Rigby*, 1 H. & N. 237.

(*a*) *Newton v. Nock*, 43 L. T. 197.

(*b*) *Abinger (Lord) v. Ashton*, L. R. 17 Eq. 358.

(*c*) *Jervis v. Tomkinson*, *supra*. As to implying such a covenant, see *James v. Cochrane*, 8 Exch. 556; *Lewis v. Fothergill*, *supra*.

(*d*) *Hanson v. Boothman*, 13 East, 22.

(*e*) See *ante*, p. 115, and cases there cited.

(*f*) Per Jessel, M. R., in *Kinsman v. Jackson*, 42 L. T. 80, 558; disapproving *Wheatley v. Westminster Brymbo Coal Co.*, L. R. 9 Eq. 538.

(*g*) *Sharp v. Wright*, 28 Beav. 150.

(*h*) *Watson v. Charlesworth*, [1905] 1 K. B. 74, following *Walker v. Jeffreys*, 1 Hare, 341; *affd.*, *sub nom. Charlesworth v. Watson*, [1906] A. C. 14.

held that the covenant did not extend to mines which never were opened either before or during the demise, as these were not the subject of the demise at all (i).

While on the one hand an injunction to stay the working of a mine or colliery will not be granted, except in cases where there is a breach of an express covenant (k), or irreparable damage likely to arise (l), on the other hand an agreement to work in a particular manner will not be enforced by specific performance (m).

Div. VI.—COVENANTS—(continued).

SECT. 9.—COVENANT FOR QUIET ENJOYMENT.

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Nature and object.—Although the real scope of the implied covenant for quiet enjoyment appears, as already stated (n), to be open to considerable doubt, that of the express covenant to the same effect is in nearly all cases restricted to the acts of the lessor himself, and of those persons who claim through or under him (o). The express covenant, as already explained (p), controls and overrides the implied one; but a restricted or qualified express covenant for quiet enjoyment does not control a covenant for title absolute in its terms (q), unless the latter be connected with it by words (r). On the other hand, an unrestricted covenant for quiet enjoyment is not restrained by qualified covenants for title, and *à fortiori* where that covenant immediately follows the covenant for title (s).

(i) *Quarrington v. Arthur*, 10 M. & W. 335.

(k) *E.g.*, of the covenant not to assign: *Lord Mostyn v. Manger*, 17 T. L. B. 281. *Cp. supra*, p. 295.

(l) *Anon.*, Amb. 209.

(m) *Fry on Sp. Perf.* p. 42 (4th ed.); *Booth v. Pollard*, 4 Y. & C. Ex. 61; *Flint v. Brandon*, 8 Ves. 159.

(n) *Ante*, p. 142.

(o) *Williams v. Burrell*, 1 C. B. 402; *Onions v. Cohen*, 2 H. & M. 354; *Howell*

v. Richards, 11 East, 633—afford instances of an express covenant absolute in its terms.

(p) *Ante*, p. 140.

(q) *Smith v. Compton*, 3 B. & Ad. 189. *Cp. Barton v. Fitzgerald*, 15 East, 530.

(r) *Browning v. Wright*, 2 B. & P. 13.

(s) *Howell v. Richards*, 11 East, 633. *Cp. Nind v. Marshall*, 1 B. & B. 319; *Young v. Raincock*, 7 C. B. 310, and see the whole matter discussed in *Sug. V. & P.* pp. 605—609 (14th ed.).

The covenant for title is an assurance that the grantor has the very estate in quantity and quality which he purports to convey; the covenant for quiet enjoyment is an assurance against the consequences of a defective title, and of any disturbance thereupon (*t*). Its object is to secure possession to the lessee, not to guarantee that he may use the premises for any particular purpose (*u*), *e.g.*, for any purpose other than those specified in particular restrictive covenants of the lease (*x*). Even where the covenant was coupled with an undertaking by the lessor to keep the premises in proper condition for a specific purpose, it was held that this applied only to their physical condition, and that there was no breach of covenant when, in consequence of an Act of Parliament being passed, the premises could no longer be used for such purpose (*y*). Nor does it enlarge the rights granted by the other parts of the lease (*z*), but only gives an additional remedy, namely, an action for damages, if the lessee cannot get, or is afterwards deprived of, that which has been previously professed to be granted (*a*). From the fact of its essential object being to guard against a disturbance of possession, it has been held that a party having only an *interesse termini* (*b*) cannot sue in respect of it (*c*); but an examination of the authorities (*d*) will show that there is more than one decision to the contrary effect (*e*).

Acts of what persons.—The persons to whose acts the covenant is usually expressed to extend are the lessor and persons claiming “by, from, or under” him. A person claiming under a settlement made by the lessor (*f*), or the appointee of a power executed by him (*g*), is within such words: and so is a prior lessee of the premises demised (*h*), or a lessee of adjacent premises holding

(*t*) *Howell v. Richards*, *supra*, per Lord Ellenborough, C. J., at p. 642.

(*u*) *Spurling v. Bantoft*, [1891] 2 Q. B. 384, per Charles, J.

(*x*) *Dennett v. Atherton*, L. R. 7 Q. B. 316.

(*y*) *Newby v. Sharpe*, 8 Ch. Div. 39.

(*z*) *Davis v. Town Properties Corporation*, [1903] 1 Ch. 797; cited *infra*, p. 302. (In the Court below the case is reported as *Davies v. Town Properties Corporation*, [1902] 2 Ch. 635.)

(*a*) *Leech v. Schweder*, L. R. 9 Ch. 463, per James, L. J. As to claim in void lease, see *post*, p. 782, n.

(*b*) *Ante*, p. 20.

(*c*) *Wallis v. Hands*, [1893] 2 Ch. 75, per Chitty, J.

(*d*) See *Ludwell v. Newman*, 6 T. R. 458; *Cloake v. Hooper*, Freem. 121.

(*e*) The two last-cited cases seem to show that the statement of Chitty, J., at the end of the first paragraph of p. 85 of the report is clearly incorrect. In *Holder v. Taylor*, Hob. 12, where an action by such party was held to lie on the implied covenant (see *ante*, p. 142), it is said that on the express covenant “perhaps it were otherwise.”

(*f*) *Hurd v. Fletcher*, 1 Doug. 43; *Evans v. Vaughan*, 4 B. & C. 261; *Carpenter v. Parker*, 3 C. B. N. S. 206.

(*g*) *Calvert v. Sebright*, 15 Beav. 156.

(*h*) *Ludwell v. Newman*, 6 T. R. 458; *Rolph v. Crouch*, L. R. 3 Ex. 44.

under the same lessor (*i*). Nor, where the interference is by a person claiming under the lessor, is the effect of the covenant restricted by the addition of qualifying words (*e.g.*, "so far as he lawfully can"), there being nothing else on the face of the lease to show that there is a defect as to the title (*k*).

On the other hand, one who claims not under but against the lessor—*e.g.*, where the disturbing act is a distress for a tax due from the lessor before the demise—is not within the first-mentioned words (*l*); nor is the remainderman in the ordinary case of a lease granted by a tenant for life under a settlement (*m*); or a person claiming by title paramount (*n*). Nor is a superior landlord; so that where the lessee of two houses included in one demise sub-let one of them, and the superior landlord ejected the sub-lessee by reason of the sub-lessor's failure to pay rent and to repair the other (*o*), there was held to have been no interruption of the sub-lessee's enjoyment by any person claiming "by, through, or under" his lessor (*p*). Even where (in an underlease) further words were added to the covenant, providing against disturbance by the "acts, means, or procurement" of the lessor or of persons claiming under him, it was held that an eviction by the head landlord for breach by the underlessee's tenant of a covenant in the head lease, of which the underlessee had no notice, was not a breach of the covenant for quiet enjoyment (*q*). But where in an underlease the covenant provided against any interruption on the part of the underlessor "or of any other occasioned by his . . . means, procurement, or consent," it was held that re-entry by the superior landlord by reason of the underlessor's default in payment of rent was a breach of the covenant (*r*). So where the purchaser of an estate took a conveyance to him and to his wife and to the heirs of himself and subsequently demised it, it was held that eviction of the tenant by the wife after her husband's death was a breach of a covenant against interruption of the enjoyment on the part of the lessor "or of any other person by or through his means, title, or procurement" (*s*).

(*i*) *Sanderson v. Mayor of Berwick*, 13 Q. B. Div. 547; *Harrison v. Muncaster (Lord)*, [1891] 2 Q. B. 680.

(*k*) *Calvert v. Sebright*, *supra*.

(*l*) *Stanley v. Hayes*, 3 Q. B. 105.

(*m*) *Pease v. Courtney*, [1904] 2 Ch. at p. 512, *per Eady, J.*

(*n*) *Woodhouse v. Jenkins*, 9 Bing. 431, *per Tindal, C. J.*

(*o*) See *post*, p. 319.

(*p*) *Kelly v. Rogers*, [1892] 1 Q. B. 910. See also *Dewar v. Goodman*, [1907] 1 K. B. 612, cited *post*, p. 423.

(*q*) *Spencer v. Marriott*, 1 B. & C. 457; followed in *Dennett v. Atherton*, L. R. 7 Q. B. 316.

(*r*) *Stevenson v. Powell*, 1 Bulst. 182.

(*s*) *Butler v. Swinnerton*, Cro. Jac. 656

Where a railway company, under their compulsory powers, purchased the reversion of property subject to a lease, and proceeded with the execution of their works, it was held that the covenant for quiet enjoyment remained in force and was binding on the company, but that, in the absence of negligence, no action could be maintained against them for any breach of the covenant committed in the reasonable exercise of their statutory powers, the tenant's only remedy being one for compensation under the Lands or Railways Clauses Acts (*t*).

Acts of what character.—It may be laid down for a general rule that the acts within the protection of the covenant are only those of a lawful character (*u*), though the covenant may of course be so worded (*e.g.*, where it is expressed to be against the acts of persons "claiming or pretending to claim" rights in the premises) as to include also acts which are unlawful (*x*). In two cases, however,—where the act is an act of the lessor himself (*y*), and where it is the act of a particular person named in the covenant (*z*)—its legality or illegality is immaterial.

The question whether the quiet enjoyment of the premises demised has been interrupted or not is in every case one of fact (*a*); and the covenant is broken although neither the title to the land nor the possession of the land may be otherwise affected, where the ordinary and lawful enjoyment is substantially interfered with by the acts of the lessor or of those lawfully claiming under him (*b*). This has been said to mean those lawfully claiming under the lessor to do the acts which have caused the interference (*c*), or those whom he has expressly or impliedly authorized to do them (*d*). Acts, for instance, done adversely to the lessor are clearly not within the covenant (*e*); but, apart from these, it is submitted

(*t*) *Manchester, &c., Ry. Co. v. Anderson*, [1898] 2 Ch. 394.

(*u*) *Hayes v. Bickerstaff*, Vaugh. 118; *Tisdale v. Essex*, Hob. 34; *Wotton v. Hele*, 2 Wms. Saund. 524 (ed. 1871), and notes thereto; *Foster v. Pierson*, 4 T. R. 617; *Jeffries v. Evans*, 19 C. B. N. S. 246; *Sanderson v. Mayor of Berwick*, 13 Q. B. Div. 547.

(*x*) *Chaplain v. Southgate*, 10 Mod. 311.

(*y*) *Corus v. Anon.*, Cro. Eliz. 544; *Lloyd v. Tomkies*, 1 T. R. 671; *Andrews v. Paradise*, 8 Mod. 318; *Crosse v. Young*, 2 Show. 425.

(*z*) *Foster v. Mapes*, Cro. Eliz. 212;

Nash v. Palmer, 5 M. & S. 374; *Foyle v. Welsh*, 1 B. & C. 29.

(*a*) *Sanderson v. Mayor of Berwick*, *supra*, per Fry, L. J.; *Budd-Scott v. Daniell*, [1902] 2 K. B. 351 (case of implied covenant). See, as to this case, *ante*, p. 141.

(*b*) *Sanderson v. Mayor of Berwick*, *supra*, at p. 551 of the report.

(*c*) *Harrison v. Muncaster* (Lord), [1891] 2 Q. B. 680, per Lord Esher, M. R.

(*d*) *Williams v. Gabriel*, [1906] 1 K. B. 155, per Bray, J.

(*e*) *Jagger v. Mansions Consolidated*, 87 L. T. 690, per Buckley, J. (cf. *Stanley*

that all lawful acts done by assignees of the reversion as incidental to their ownership of the reversion, and causing an interruption of the tenant's enjoyment as their natural consequence, are within the protection of the covenant (*f*). Structural injury to demised premises (*g*), or obstruction of a way demised with them (*h*), or a distress made on the premises by a person lawfully claiming under the lessor for rent due from a third party (*i*), are instances of acts of interference which have been held to amount to a breach. So the covenant was held to be broken where a tenant of demised premises was, for a short period, deprived of their possession by reason of the landlord entering to do certain repairs, to the execution of which the tenant had given consent under pressure (*k*).

But a mere temporary inconvenience which does not interfere with the estate or title or possession, as one caused by a lessor, not in depriving his tenant of a right of way, but in rendering his access less convenient than it was, is not a breach of the covenant (*l*). And the covenant gives ordinary, and not extraordinary, protection to the tenant; so that, though broken by the lessor causing the premises to become unfit for the purpose for which it was intended that they should be used generally (*m*), to make them unfit only for a particular species of user unknown to him would be no breach (*n*). Inasmuch too as the covenant must be construed with regard to the circumstances which existed at the date of the lease, it has been held that assignees of the reversion (*o*) were not liable for acts done by them, not in their character of persons claiming under the lessor, but in exercise of their rights

v. Hayes, 3 Q. B. 105, cited *supra*). In this case (cited *ante*, p. 261) there was a demise of flats under a general scheme, and it was held both by Buckley, J. and by the C. A. that the subsequent acceptance of rent from the persons guilty of the acts complained of was evidence of authority on the part of the reversioners.

(*f*) It is thought that the grounds on which the decision in *Williams v. Gabriel*, *supra*, is professedly founded can with difficulty be reconciled with this principle.

(*g*) *Manchester, &c., Ry. Co. v. Anderson*, [1898] 2 Ch. 394.

(*h*) *Morris v. Edgington*, 3 Taunt. 24.

(*i*) *Dawson v. Dyer*, 5 B. & Ad. 584.

(*k*) *Budd-Scott v. Daniell*, *ubi sup.*, cited *infra*, p. 304.

(*l*) *Manchester, &c., Ry. Co. v. Anderson*, *supra*, per Lindley, M. R.

(*m*) *Leader v. Moody*, L. R. 20 Eq. 145; *Aldin v. Latimer Clark & Co.*, [1894] 2 Ch. 437.

(*n*) *Robinson v. Kilvert*, 41 Ch. Div. 88; see per Lindley, L. J., and cp. *supra*, p. 298, at note (*u*), and *ante*, p. 146.

(*o*) Although the point cannot be said to have been decided, it is thought that the reasoning upon which the decision in the case cited in the next note is founded points to the conclusion that the action would have been equally unsuccessful if there had been no assignment of the reversion, and the acts complained of had been done by the lessors themselves. This was actually the case in *Booth v. Alcock*, L. R. 8 Ch. 663 (referred to in the judgment of Collins, M. R.), where the principle of derogation from grant was invoked unsuccessfully.

under an independent title acquired by them subsequently to the lease (*p*).

The interference in question may consist either directly in the act itself (*q*), or in its probable or necessary consequences (*r*), but not in the consequences of the acts of the lessor or of persons claiming under him which the parties to the covenant could not have foreseen, and which are therefore, in accordance with what has just been stated, not within the protection of the covenant (*s*). It may consist of an act of omission—*i.e.*, the omission of some duty (*t*)—as well as of commission (*u*), and in the latter case it need not be committed upon the demised premises themselves (*x*); but in the case of physical acts some physical interference is necessary, as a mere annoyance (such as noise and vibration) from adjacent premises, even though legally a nuisance, and actionable as such (*y*) or, on the principle already explained (*z*), as a derogation of the lessor's grant, is not a breach of the covenant (*a*). This has been expressed by saying that the disturbance must be of a physical and not of a metaphysical nature (*b*). The erection, however, by a lessor, upon premises adjacent to a house demised by him, of buildings of such height as to cause ordinary currents of wind to be diverted and driven down the chimneys of the house, with the result of making them smoke, has been held to amount to such physical interference (*c*). It seems doubtful, however, whether this decision can be regarded as correct; for the true principle seems to be that where by the alleged breach neither the title to, nor the possession of, the land is affected, and what the

(*p*) *Davis v. Town Properties Corporation*, [1903] 1 Ch. 797 (cp. at note (*c*), *supra*). The act complained of was the erection of a building on adjoining land acquired by the assignees three years after the lease was granted. (In the court below the case is reported as *Davies v. Town Properties Corporation*, [1902] 2 Ch. 635.)

(*q*) *Andrews v. Paradise*, 8 Mod. 318.

(*r*) *Shaw v. Stenton*, 2 H. & N. 858, and per Field, J., in *Anderson v. Oppenheimer*, *infra*.

(*s*) *Harrison v. Muncaster* (Lord), [1891] 2 Q. B. 680.

(*t*) *Cohen v. Tannar*, [1900] 2 Q. B. 609, per Vaughan Williams, L. J.

(*u*) *Anderson v. Oppenheimer*, 5 Q. B. Div. 602, per Cotton, L. J.

(*x*) *Shaw v. Stenton*, 2 H. & N. 858, per Watson, B.

(*y*) *Grosvenor Hotel Co. v. Hamilton*,

[1894] 2 Q. B. 836. The damages, as in other cases of tort, should extend to all the natural consequences of the lessor's wrongful act: *id.*

(*z*) *Ante*, p. 145.

(*a*) *Jenkins v. Jackson*, 40 Ch. D. 71; *Hudson v. Cripps*, [1896] 1 Ch. 265; and cp. *Potts v. Smith*, L. R. 6 Eq. 311, at p. 317. In *Robson v. Palace Chambers Co.*, 14 T. L. R. 56, however, the obstruction, by building on adjoining premises, of the access of light to the demised premises seems to have been regarded as a possible breach of the covenant; but the point was apparently not argued, and the decision was that under the circumstances of the case (cited *ante*, p. 86) no breach of the covenant had been committed.

(*b*) *Jaeger v. Mansions Consolidated*, 87 L. T. 690, per Buckley, J.

(*c*) *Tebb v. Cave*, [1900] 1 Ch. 642.

lessee complains of is only an interruption of his enjoyment of the land by some act of the lessor, that act must, in order to be a breach of the covenant, amount to a direct interference with that enjoyment (*d*).

But an interference with the title and possession of the land (and not merely with a particular mode of enjoyment of it) by legal proceeding (*e*), or by giving notice to the lessee's sub-tenants of the demised premises not to pay their rent to him (at any rate, if such notice be acted upon (*f*), and not a mere idle threat (*g*)), is undoubtedly a breach of the covenant. The mere fact, however, that a decree is made in a Chancery suit (to which the tenant is not a party), by which the land is declared to be subject to a general right of common over it, is not a breach, even though the tenant be bound by it so as not to be able to dispute the existence of such right (*h*). Nor is the covenant broken by the lessor's refusal, though unjustifiable (*i*), of his consent to an assignment by the lessee (*k*).

On the other hand, though re-entry by a superior landlord, as already seen (*l*), is not within the purview of the ordinary covenant for quiet enjoyment, where a lessor, on ejection being brought against him by his superior landlord (who had really no right of re-entry at all), signed a consent order for judgment under which judgment for possession was entered and the lessee evicted, it was held that the covenant was broken, inasmuch as the lessee lost the possession by an order which acquired its validity solely from the voluntary act of the lessor (*m*).

It makes no difference whether the authority to do the act complained of as a breach of the covenant for quiet enjoyment be given before or after the lease is granted; but the act itself must be done after that time, or it will not amount to a breach of the covenant (*n*). And where a lease to commence at a future date contains a covenant for quiet enjoyment during the term, the lessee

(*d*) *Davis (or Davies) v. Town Properties Corporation*, *supra*, per Romer, L. J.

(*e*) *Dennett v. Atherton*, L. R. 7 Q. B. 316, per Willes, J.

(*f*) *Edge v. Bolleau*, 16 Q. B. D. 117.

(*g*) *Id.*, per Pollock, B., distinguishing *Witchcot v. Nine*, 1 Brown. & G. 81.

(*h*) *Howard v. Mailland*, 11 Q. B. Div. 695 (a case as between vendor and purchaser, but the same principle would seem to apply).

(*i*) See *ante*, pp. 271—273.

(*k*) *Goodwin v. Saturley*, 16 T. L. R. 437.

(*l*) *Supra*, p. 299.

(*m*) *Cohen v. Tannar*, [1900] 2 Q. B. 609. The underlease in this case was for the whole term, and consequently in reality an assignment (*ante*, p. 6), but the same principle applies.

(*n*) *Anderson v. Oppenheimer*, 5 Q. B. Div. 602. Cf. *Blatchford v. Mayor of Plymouth*, 3 Bing. N. C. 691.

cannot sue upon the covenant before the commencement of the term (*o*).

The fact that the act which disturbs the tenant's enjoyment is done by the landlord in pursuance of a statutory duty has been held—at least where the statute is one which was in existence at the time of the letting—to afford no answer to a claim on the covenant (*p*). The view seems also to have been entertained that there may be an interruption of the enjoyment within the meaning of the covenant even in a case—like that furnished by the “dangerous structure” clauses of the London Building Act—where at the time of the letting it is quite uncertain that it will take place at all (*q*). If this view be correct, it is thought that the same result ought to follow where the act in question, in compliance with a very usual provision in statutes of the kind, has on the landlord's default been done by a public authority (*r*); for otherwise the landlord would be in a better position when he made such default than when he discharged his statutory obligation (*s*). This, however, can hardly be the case, inasmuch as the act of disturbance would appear then to be one done, not under, but against the landlord (*t*). It seems, moreover, rather a startling conclusion that provisions like those in question, passed (speaking generally) merely for the protection of the public, could have the effect of making a lessor liable to his lessee, when but for them (the real cause of the interruption of the latter's enjoyment being the defective state of the premises) no such liability could have existed (*u*). And where—as in the London Building Acts (*v*)—the work required is done by the lessor (when the lessee's interest exceeds that of a yearly tenant) for the benefit of both parties, it would appear that the leave and licence of the lessee for the necessary disturbance of his possession

(*o*) *Ireland v. Bircham*, 2 Bing. N. C. 90.

(*p*) *Budd-Scott v. Daniell*, [1902] 2 K. B. 351. The statutory obligation here was to paint the outside of the premises within a certain period covered by the letting, and it was found as a fact that the lessor had let them in forgetfulness of its existence. The covenant for quiet enjoyment was not express but implied (see *ante*, p. 141), but the principle is the same.

(*q*) *Williams v. Gabriel*, [1906] 1 K. B. 155 (see at p. 157). The lease here was before the Act, but similar clauses are contained in an earlier Act which was in existence when it was made.

(*r*) *E.g.*, the Public Health Act (38 &

39 Vict. c. 55), ss. 94—98. In the London Building Act (57 & 58 Vict. c. ccciii.), having regard to the definition of “owner” it contains (sect. 5), this point could not, it is thought, arise in the case of any tenant with a greater interest (as in *Torrens v. Walker*, [1906] 2 Ch. 166) than one from year to year; and moreover, he would be liable, in the case contemplated, to contribute to the expenses of the work done, so that a sort of partnership between landlord and tenant in the matter is recognised.

(*s*) See *Baily v. De Crespigny*, L. R. 4 Q. B. at p. 184.

(*t*) Cf. *supra*, p. 300.

(*u*) See *ante*, p. 144.

(*v*) See note (*r*), *supra*.

might well be presumed. Moreover, under those Acts power to the lessor in such a case to enter and remain on the premises, for the purpose of executing any work which he is required to do, is expressly conferred upon him (x).

Damages and Injunction.—The measure of damages upon a breach of the covenant, where the cause of such breach is eviction of the lessee, is—in addition to the expenses to which he has necessarily been put—the full value of what he has lost by being evicted (y), the damages being assessed, once for all, upon that footing (z); and even the costs paid and the expenses incurred in unsuccessfully defending an action brought by the disturber, if the course was a reasonable one to follow, may be recovered (a). If, however, the disturbance has not amounted to an eviction, only those damages can be recovered which have been actually sustained (b); but the damage can now be assessed, if the cause of action be continuing—i.e., if it arises from the repetition of acts or omissions of the same kind as that for which the action was brought (c)—down to the actual date of assessment (d).

Where a covenant for quiet enjoyment in an underlease (by which the underlessee was bound to repair) expressly extended to a disturbance by the head landlord, and, the head lease expiring a year before the underlease, the underlessee was threatened with eviction a year before the end of his term, it was held that the underlessee, having, to avoid such eviction, taken a fresh lease at a diminished rent from the head landlord, was entitled merely to nominal damages for the breach of the covenant, though he was only able to obtain such fresh lease upon payment of a large sum by way of fine and in respect of dilapidations (e).

The breach of a covenant for quiet enjoyment may be restrained by injunction (f), and, where the nature of the case requires it, by injunction of a mandatory kind (g).

(x) See 57 & 58 Vict. c. cxxiii., s. 92.

(y) *Williams v. Burrell*, 1 C. B. 402;
Lock v. Furze, L. R. 1 C. P. 441.

(z) *Child v. Stenning*, 11 Ch. Div. 82,
per Jessel, M. R.

(a) *Rolph v. Crouch*, L. R. 3 Ex. 44;
Button v. Baillie, 65 L. T. 528.

(b) *Child v. Stenning*, *supra*.

(c) See *Hole v. Chard Union*, [1894]
1 Ch. 293.

(d) R. S. C. 1883, O. 36, r. 58.

(e) *Jones v. Hawkins*, 3 T. L. R. 59.
There was, however, evidence that no
fine would have been required on renewal
for only a year.

(f) See, e.g., *Shaw v. Stenton*, 2 H. &
N. 858; *Tipping v. Eckerley*, 2 K. & J.
264.

(g) *Allport v. Securities Corporation*,
64 L. J. Ch. 491.

DIV. VI.—COVENANTS—(continued).

SECT. 10.—COVENANT FOR RENEWAL.

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Leases not infrequently contain a provision by which the lessor undertakes, upon being called on to do so by the lessee, and usually upon the payment of a specified premium or fine, to renew the lease on the same terms at its expiration. A lease, however, granting premises for a certain term, and purporting to be granted "with the option of renewal" simply, may have effect given to it, as it imports that the renewed tenancy is to be of the same duration and (with the exception presently referred to (*h*)) subject to the same terms as the one to which it succeeds (*i*). And in conformity with the principle that a doubtful grant is always construed in his favour, such option is vested only in the lessee (*i*).

Where a lessor covenanted, at any time during the term, to renew the lease upon request "and at the costs of the lessee," and on payment by him of a fine depending on the improved annual value of the premises at the time of renewal, and it was stipulated that such value should be determined by the lessor's surveyor, or, at the option of the lessee, by the award of two referees or their umpire, it was held that the costs of a reference and award, in proceedings resorted to in pursuance of the lessee's above-mentioned right, were within the covenant as being part of the necessary expenses of the renewal of the lease (*k*).

A lessor who, himself only holding for years determinable on lives, has covenanted with his lessee to use his utmost endeavours to procure upon the dropping of such lives a renewal of his own lease is bound to pay any reasonable sum which may be required for such renewal, or he commits a breach of his covenant (*l*). And if a termor demising for years has covenanted to renew on the same terms without fine, on every renewal obtained by him he will

(*h*) *Infra*, p. 308.

(*i*) *Lewis v. Stephenson*, 67 L. J. Q. B. 296.

(*k*) *Mostyn (Lord) v. Fitzsimmons*, [1903] 1 K. B. 349; *affd.*, H. L., *Fitz-*

simmons v. Mostyn (Lord), [1904] A. C. 46. Cf. *In re Baylis*, [1907] 2 Ch. 54, cited *post*, p. 337.

(*l*) *Stimpson v. Clayton*, 4 Bing. N. C. 758.

be bound so to renew, even though it has been only on payment of a heavy fine (*m*) or of a largely increased rent (*n*) that he has obtained renewal himself. Where, however, the covenant in question is conditional on the lessor himself obtaining a renewal of his lease (*o*), he is under no obligation to obtain such renewal (*p*); and where in such a case a renewal was obtained, but in the name of a third person as trustee for the lessor's wife, it was held to be a question of fact—the burden of proving which rested on the lessee—whether such renewal was in truth obtained by the lessor, and that it was so obtained if the transaction were merely colourable and the trustee in reality a trustee for him (*p*).

A covenant to renew a lease by adding a new life on the dropping of one of a number of lives named in it will not be enforced if the effect of such enforcement would be to create an equitable lease for a term exceeding the limit permitted by a statute (*q*). And a covenant for renewal in a lease executed by a lessor under a power of granting leases in possession at the best rent will not be enforced if at the time when performance is claimed the stipulated rent is not the best rent, or if the proposed new lease contains stipulations not then authorized by the power (*r*). So if a lease be void, *e.g.*, in consequence of offending against the provisions of mortmain (*s*), no effect, of course, can be given to a covenant of renewal contained in it (*t*).

The effect of the renewal of a surrendered lease upon sub-leases will be considered hereafter (*u*).

Covenants for renewal—even though perpetual (*x*)—are recognised exceptions from the rule against perpetuities (*y*).

If the renewal of a lease is obtained by a person whose interest in the lease is only partial, he will be held to be a constructive trustee of the new lease if (and only if) in respect of the old lease he occupied some special position (*e.g.*, that of a partner) and

(*m*) *Retell v. Hussey*, 2 Ball & B. 280; *Lawder v. Blachford*, Beat. 522. As to covenant by lessee to pay a proportionate part of the fine, see *Charlton v. Driver*, 2 B. & B. 345.

(*n*) *Evans v. Walshe*, 2 Sch. & L. 519.

(*o*) See *Muller v. Trafford*, [1901] 1 Ch. 54, where it was held that a covenant of this kind (see, however, p. 433, *post*) on its true construction was personal to the lessor, and did not apply when renewal was obtained only by his assigns.

(*p*) *Lumley v. Timms*, 28 L. T. 608, per Lord Selborne, L. C.

(*q*) *Moore v. Clench*, 1 Ch. D. 447; cited *ante*, p. 51.

(*r*) *Gas Light, &c., Co. v. Towse*, 35 Ch. D. 519; *Doe v. Bettison*, 12 East, 305; *Salamon v. Sopwith*, 35 L. T. 826.

(*s*) See *ante*, pp. 70, 71.

(*t*) *Bunting v. Sargent*, 13 Ch. D. 330.

(*u*) See *post*, p. 643.

(*x*) See under next head.

(*y*) See *L. & S. W. Ry. Co. v. Gomm*, 20 Ch. Div. at p. 579, per Jessel, M. R.; *Muller v. Trafford*, *supra*; *Woodall v. Clifton*, [1905] 2 Ch. 257.

owed, by virtue of that position, a duty towards the other persons interested (z).

Perpetual renewal.—It is now established that where a covenant for renewal is expressed in a lease in the usual terms, *i.e.*, an undertaking by the lessor to grant at its expiration a new lease to contain the same covenants, such covenants will not include the covenant for renewal itself (a); for otherwise it is clear that the renewals would be perpetual, and the leaning of the Courts has always been against such a result (b). And though the fact that the parties have on several previous occasions renewed has been held material to show that on the true construction of the covenant it is one for perpetual renewal (c), this decision has frequently been called in question on the ground that a legal instrument (if unambiguous (d)) is not to be construed by the acts of the parties (e), and it may now be regarded as overruled (f). The above result has been expressed by saying that although an agreement for perpetual renewal will be enforced if it clearly appear to have been within the intention of the parties, that intention is not to be inferred from a mere general provision for renewal of the lease with the same covenants (g). But such a provision may be stipulated for in express terms (h), or it may be expressly stipulated that the "same covenants" to be contained in the renewed lease shall include the covenant for renewal itself (i).

So the covenant, though not in terms for perpetual renewal, may contain expressions from which an intention to that effect may be inferred, *e.g.*, where it stipulates that the lessor and his successors should "continue the renewing" of the lease to the lessee and his successors (k), or that they should renew to them "always at any time" upon request (l), or even (as it has been

(z) *In re Biss*, [1903] 2 Ch. 40, per Romer, L. J.

(a) *Hyde v. Skinner*, 2 P. Wms. 196; *Tritton v. Foote*, 2 Bro. C. C. 636; *Russell v. Darwin*, *id.*, 639, n.; *Lewis v. Stephenson*, 67 L. J. Q. B. 296.

(b) *Baynham v. Guy's Hospital*, 3 Ves. 295; *Moore v. Foley*, 6 Ves. 232.

(c) *Cooke v. Booth*, Cowp. 819.

(d) See *Marshall v. Berridge*, 19 Ch. Div. 233; *N. E. Ry. Co. v. Hastings*, [1900] A. C. 260.

(e) *Baynham v. Guy's Hospital*, *supra*; *Eaton v. Lyon*, 3 Ves. 690; *Moore v. Foley*, *supra*.

(f) *Iggulden v. May*, 2 N. R. 449.

(g) *Id.*, 9 Ves. 325; 7 East, 237; 2 N. R. 449; *Harnett v. Yielding*, 2 Sch. & L. 549.

(h) *London (City of) v. Mitford*, 14 Ves. 41; *Nicholson v. Smith*, 22 Ch. D. at p. 644.

(i) *Job v. Banister*, 2 K. & J. 374; *affd.*, 26 L. J. Ch. 125; *Hare v. Burges*, 4 K. & J. 45.

(k) *Furnival v. Crew*, 3 Atk. 83.

(l) *Copper Mining Co. v. Beach*, 13 Beav. 478.

held) where the covenant is to grant such further lease under the same rent and covenants as should by the lessee be desired (*m*). On the other hand, an undertaking "from time to time" to renew is not sufficient for this purpose (*n*). Nor, from a stipulation on the part of the lessee in a lease for lives that upon the renewing or inserting of any life or lives a certain fine should be paid to the lessor, his heirs and assigns, will a covenant for perpetual renewal be implied on the part of the latter (*o*). The burden of strict proof is imposed upon any one claiming the right of perpetual renewal, and it is not to be inferred from any equivocal expressions which are fairly capable of being otherwise interpreted (*p*).

Application for renewal by lessee (*q*).—Where, as is usually the case, the lessor covenants to renew upon being applied to for the purpose by the lessee, the latter will forfeit his right under the covenant if he fail to make application at the specified time (*r*), though upon his death within the term the benefit of the covenant will extend to his executors (*s*). Thus, where a lease for a certain term, commencing "as to the houses and grass at the term of Whitsunday, and as to the arable land at the separation of the crop from the ground," was made renewable on requisition by the lessee made "at least twelve months before the expiry of the above term," it was held that a requisition made, in the year in which the tenancy came to an end, after Whitsunday, but before the separation of the crop, was ineffectual (*t*). So, on a covenant in a lease for sixty-one years to renew it, on the lessee's application, at any time within one year after the expiration of twenty years, for a further term of twenty years, to commence at the end of the term of sixty-one years, and so in like manner at the end of every twenty years during the term, the lessee must claim renewal at the end of the first twenty years, or he cannot claim it afterwards (*u*). But a covenant by the lessor

(*m*) *Bridges v. Hitchcock*, 5 Bro. P. C. 6; explained in *Iggulden v. May*, 7 East, 237.

(*n*) *Brown v. Tighe*, 2 Cl. & F. 396.

(*o*) *Smyth v. Nangle*, 7 Cl. & F. 405.

(*p*) *Swinburne v. Milburn*, 9 App. Ca. 844, per Lord Selborne, L. C.; *Walmesley v. Pilkington*, 35 Beav. 362. (The decision in this latter case was dissented from on appeal on the construction of the covenant: C. A. (unreported), Dec. 18, 1866, *cor. Cairns & Turner*, L. J.J.)

(*q*) A similar question as to when, in an agreement for a lease with an option to the tenant to take a lease, that option can be exercised will be found discussed *post*, p. 377.

(*r*) *Bayly v. Corporation of Leominster*, 1 Ves. 476; *Baynham v. Guy's Hospital*, 3 Ves. 295; *Eaton v. Lyon*, *id.*, 690.

(*s*) *Hyde v. Skinner*, 2 P. Wms. 196.

(*t*) *Wight v. Hopetoun (Lord)*, 4 Macq. 729.

(*u*) *Rubery v. Jervoise*, 1 T. R. 229.

in such a lease that if the lessee desire to renew at the expiration of "any or every" term of fourteen years he shall, on giving a specified notice and paying a specified sum, have a fresh lease for sixty-one years, may be enforced by the lessee at the end of any fourteenth year during the lease (*x*).

The lessor, however, will not be permitted to take advantage of the lessee's default, either in applying at the proper time (*y*), or in fulfilling some other condition (*z*), to refuse him a renewal if his own conduct has been such as to render it inequitable that he should do so; for such a case is one in which the Court will relieve the lessee from a forfeiture for not literally complying with the terms of the covenant to renew (*a*), as distinguished from the case where such forfeiture has been caused by his own want of diligence (*b*). Where a lease of copyholds really intended to endure for ninety-nine years was, in order to comply with the custom of the manor, limited to twenty-one years, with power to the lessee to renew by successive lettings up to the longer limit, it was held that his successor in interest, who had made a considerable outlay on the premises, was entitled to renew, even though the lessor had availed himself of a proviso in the lease to re-enter for non-payment of rent, and no application for renewal had been made at the expiration of the first twenty-one years (*c*).

Where the lease is silent as to the time when application for renewal should be made, it has been said that it must be made a reasonable time before its expiration (*d*). But it is not, as it is thought, to be inferred that the lessee will lose his right of renewal altogether by not having made it, if he continue in possession afterwards with the sanction of the lessor (*e*).

Other conditions precedent.—Moreover, the covenant to renew is often made subject to the due performance of his covenants by the lessee, and when this is the case such performance is strictly a condition precedent to the renewal of the lease (*f*); nor, if he has not performed them, is it material that he may

(*x*) *Bogg v. Mid. Ry. Co.*, L. R. 4 Eq. 810.

(*y*) *Hunter v. Hopetoun (Lord)*, 13 L. T. 130.

(*z*) *Statham v. Liverpool Docks Trustees*, 3 Y. & J. 565.

(*a*) *Ross (Lord) v. Worsop*, 1 Bro. P. C. 281.

(*b*) *Eaton v. Lyon*, 3 Ves. 690; *Maxwell v. Ward*, M'Clel. 458; *Reid v.*

Blagrave, 9 L. J. (O. S.) Ch. 245; *Harries v. Bryant*, 4 Russ. 89. See *Hussey v. Domsile*, [1900] 1 I. R. 417; [1903] 1 I. R. 265.

(*c*) *Rawstorne v. Bentley*, 4 Bro. C. C. 415.

(*d*) *Lewis v. Stephenson*, 67 L. J. Q. B. 296. The *dictum* was clearly not necessary to the decision of the case.

(*e*) See *post*, p. 377.

(*f*) *Ante*, p. 133.

have spent considerable sums of money upon improvements to the premises (*g*). Hence, if at the time renewal is applied for there is any existing right of action in the lessor in respect of the covenants of the lease, the lessee's right of renewal will be lost, even though the breaches (*e.g.*, of the covenant to repair) be of a trifling character (*h*). So where in a demise for years the lessor covenanted to renew for a further term, on the lessee performing his covenants and giving six months' notice of his desire to renew before the end of the term, it was held that evidence of a breach of the lessee's covenant to repair, both at the date of the notice and at its expiration, disentitled him to renewal (*i*). And even if the breach of covenant and right of re-entry under it have been waived by acceptance of rent with knowledge of the breach having occurred (*k*), such waiver will not extend to the condition precedent so as to entitle the lessee to the benefit of the covenant to renew (*l*). Where the covenant was to renew the lease at the expiration of the term, if not sooner determined by the lessee's acts or defaults, it was held that breaches of covenant committed by him during the term caused a forfeiture of his right of renewal, even though, in consequence of the lessor's ignorance of their having taken place, the term had not been determined before its expiration (*m*).

The above principle is founded on the consideration that, the right of renewal being a privilege to the lessee (*n*), a strict compliance on his part with any requirements that may be named is necessary. Where, however, the lessor's covenant was to grant a renewed lease at any time before the expiration of the term, whenever required by the lessees, and upon payment of a specified sum as a fine on its execution, it was held (in an action to enforce the covenant) that it was not necessary for the lessees to pay the fine or execute a new lease before the expiration of the term, but that it was necessary that notice of an intention to renew should be given before the end of the term, and that for this purpose an informal notice was sufficient (*o*). The lessee, too, can of course only ask for such a lease as the lessor has covenanted to grant (*p*); hence, if a lease be made to two persons with joint and several

(*g*) *Job v. Banister*, 2 K. & J. 374; *affd.*, 26 L. J. Ch. 125.

(*h*) *Finch v. Underwood*, 2 Ch. Div. 310.

(*i*) *Bastin v. Bidwell*, 18 Ch. D. 238.

(*k*) See p. 652, *post*.

(*l*) *Bastin v. Bidwell*, *supra*; *Finch v. Underwood*, *supra*, per Mellish, L. J.

(*m*) *Thompson v. Guyon*, 5 Sim. 65.

(*n*) See p. 134, *ante*.

(*o*) *Nicholson v. Smith*, 22 Ch. D. 640.

(*p*) Per Mellish, L. J., in next-cited case.

covenants, one of them cannot (at all events in the lifetime of the other) enforce an undertaking by the lessor to grant a renewed lease to them, subject to the same covenants, by calling for a lease to himself (*q*).

Option of purchase.—Analogous to the right of renewal is the option often conferred on tenants by their leases of purchasing the reversion on giving a specified notice of their desire to do so. (It has already been seen (*r*) that leasing in this manner is not permitted to executors; and, moreover, a power to lease or sell property conferred upon the managing body of a company by its deed of incorporation will not authorize it (*s*), though power given by Act of Parliament to a corporation to sell land has been held to do so (*t*).) As in the preceding case, the requirements of the stipulation as to notice must be strictly complied with: thus, where in a lease granted by three trustees the lessee had an option of purchase at any time during the term, on giving written notice "to the said lessors or the survivors or survivor of them, or the executors, administrators, or assigns of such survivors," it was held that a notice given to one only of the trustees, they being at the time all alive, was ineffectual (*u*). But, as in all similar matters, the right to notice may be waived; and such waiver need not be express, but may be implied from all the surrounding circumstances of the case (*x*).

Where it is simply stipulated that the tenant is to have the option of purchase at any time during the term for a specified sum, and that upon payment thereof the term and the rent shall cease and that he shall be entitled to an assignment, payment of the purchase-money is not a condition precedent to the existence of the contract of purchase (*y*). But in an undertaking to sell, if the lessee should desire to purchase, and should give notice to that effect, and should pay the purchase-money, such payment is a condition precedent, so that if not made no binding contract can arise (*z*). And inasmuch as an option of purchase gives rise to a unilateral contract (for it binds the lessor but not the lessee), any delay on the part of the latter is looked upon with especial

(*q*) *Finch v. Underwood*, 2 Ch. Div. 310.

(*r*) *Ante*, p. 57.

(*s*) *Clay v. Rufford*, 5 De G. & S. 768.

(*t*) *Re Female Orphan Asylum*, 17 L. T. 59.

(*u*) *Sutcliffe v. Wardle*, 63 L. T. 329.

(*x*) *Friary, &c., v. Breweries v. Singleton*, [1899] 2 Ch. 261; cited *infra*, p. 314.

(*y*) *Mills v. Haywood*, 6 Ch. Div. 196.

(*z*) *Weston v. Collins*, 34 L. J. Ch. 353.

strictness (*a*). This is generally expressed by saying that time is of the essence of the contract (*b*): though where, after delay by the lessee, express notice to fulfil the contract upon a threat that time will be so regarded is given by the lessor (*c*), such notice must, having regard to the date when it is given, be of reasonable length (*d*).

Where, for instance, in the lease of a house for twenty-one years from Midsummer, 1888, providing for payment of rent on the usual quarter days, it was stipulated that if the lessee should be desirous at any time before Midsummer, 1891, to purchase the fee simple at an agreed price, "and of such desire . . . give to the lessor, his heirs and assigns, six calendar months' previous notice in writing expiring on one of the quarter days," the lessor would at the expiration of such notice convey the premises to him, it was held that no notice given later than six months before Midsummer, 1891, was in time for the option of purchase to be exercised (*e*). So if the lessee, though he give the required notice, fail in paying the purchase-money by the appointed time, his right of purchase is gone (*f*); and accordingly, if it be stipulated that such payment should be made "at the expiration" of the notice, this will be held to intend the precise day on which the notice expires (*g*). But delay may be waived by the lessor, as where he has insisted on the contract being performed after the lapse of the appointed time (*h*). On the other hand, though possession, as will be explained hereafter (*i*), sometimes saves a purchaser from the consequences of delay, it must be possession under the contract sought to be enforced, and the vendor must have known, or be taken to have known, that the purchaser claimed to be in possession under the contract (*k*). Hence, where a lessee who had given due notice of purchase allowed the matter, after some negotiation had taken place, to drop, and then for more than five years remained in possession without insisting on the completion of the purchase, but making periodical payments to the reversioner (for most of which he took receipts describing them as rent), it was held that his possession had not been such as to prevent his delay from being fatal to his claim for specific performance (*l*).

(*a*) Fry on Specific Performance, p. 477 (4th ed.).

(*b*) See *post*, p. 376.

(*c*) Cf. *post*, p. 377.

(*d*) *Crawford v. Toogood*, 13 Ch. D. 153.

(*e*) *Biddell v. Durnford*, W. N. 1893, p. 30.

(*f*) *Weston v. Collins*, *supra*.

(*g*) *Ranelagh (Lord) v. Mellon*, 2 Dr. & Sm. 278.

(*h*) *Fegg v. Wisden*, 16 Beav. 239.

(*i*) *Post*, pp. 377, 378.

(*k*) *Mills v. Haywood*, *supra*.

(*l*) *Id.*; Fry, pp. 479, 480.

Where a building agreement, providing in the usual way for the grant of a lease upon the completion of certain buildings by the lessee, and also providing for determination of the agreement and re-entry by the lessor upon written notice in the event of the lessee's failing to perform his obligations, contained an option to the latter to purchase the freehold, it was held that, though there had been such failure by the lessee, the exercise of his option was not dependent upon the observance of his obligations, and consequently that the determination of the leasing part of the agreement by a notice given by the lessor (shortly after receiving notice of the intention to purchase) did not destroy the contract for sale created by the exercise of the option (*m*).

A covenant that if the lessee, his executors, administrators, or assigns, should at any time thereafter desire to purchase the fee, and should give notice to that effect to the lessor, his heirs, or assigns (*n*), the latter would convey the fee for a stipulated sum, is a covenant the benefit of which can only enure to those entitled under the lease (*o*). But the undertaking to sell may be so expressed as to be independent of the right to the lease, and in such case may be enforced against the lessor even by a lessee who has committed forfeiture (*p*). Where a lease, which gave an option of purchase to the lessee within a fixed time, contained a proviso that if damage should be caused to the premises by fire, in excess of a specified amount, the term should cease as from the time of its happening, it was held that the option continued even though the term had ceased in consequence of such damage having occurred (*q*). The term "assigns" in an option of purchase must be construed as having the same meaning as it has when added to the lessee's name in the covenants entered into by and with him in the lease, *i.e.*, the persons entitled to the term as between them and the lessor, and bound by and entitled to the benefit of the covenants entered into by the lessee and lessor respectively which run with the land (*r*) demised; and it will not, consequently, comprise a mere equitable assignee (*s*) of the lease, although in possession of the premises and paying the reserved rent (*t*).

(*m*) *Raffety v. Schofield*, [1897] 1 Ch. 937.

(*n*) As to the party to whom, upon the lessor's death, such notice should be given, see *Woods v. Hyde*, 31 L. J. Ch. 295.

(*o*) *In re Adams*, 27 Ch. Div. 394.

(*p*) *Green v. Low*, 22 Beav. 625.

(*q*) *Edwards v. West*, 7 Ch. D. 858, at p. 860.

(*r*) See p. 417, *post*.

(*s*) See p. 415, *post*.

(*t*) *Friary, &c., Breweries v. Singleton*. [1899] 1 Ch. 86 (affd. on appl., as to the law so laid down, 2 Ch. 261).

Where (the lessor having covenanted to insure) the lessee waits to exercise his option of purchase until after a fire has happened, he cannot claim the insurance money as part of his purchase if at the time he exercises such option it has already been paid to the lessor (u). But where the lessee, having covenanted to insure to a specified amount and to reinstate the premises in case of fire, received, upon a fire happening, a portion only of the insurance money, in consequence of the lessor having, without his knowledge, effected a policy on the premises himself, it was held, upon the lessee then claiming his right of purchase, that the lessor was entitled neither to retain for his own benefit the moneys received under the policy he had effected, nor to insist on the moneys being applied in reinstating the property after the lessee had exercised his option (x).

It has been held that a covenant or proviso conferring an option of purchase on the lessee creates an interest in the land, and, unlike the covenant for renewal (y), is within the rule against perpetuities (z). The contract itself, however, as it has been held—unlike the limitation which is created by the doctrine of equity—is not void, and though specific performance of it will not be decreed, damages may be recovered for its breach (a).

(u) *Edwards v. West*, *supra*.

(x) *Reynard v. Arnold*, L. R. 10 Ch. 386.

(y) *Supra*, p. 307.

(z) *Woodall v. Clifton*, [1905] 2 Ch.

257, per Warrington, J. The decision was affirmed by the C. A. on another ground.

(a) *Worthing Corporation v. Heather*, [1906] 2 Ch. 532.

CHAP. I.—THE LEASE (*continued*).

DIV. VII.—CONDITIONS—THE PROVISIO FOR RE-ENTRY.

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Nature of conditions.—A condition is a qualification annexed to an estate, whereby the latter shall either be created (*condition precedent*), enlarged, or defeated (*condition subsequent*) upon its performance or breach (*b*). Conditions must be distinguished from limitations. When the estate is so confined by the words of its creation that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, *e.g.*, a grant to A. B. so long as he remains parson of Dale (*c*), or so long as he continues to act as agent for certain property (*d*): this is called a *limitation* (*e*). In such case the estate determines as soon as the contingency happens, and the next subsequent estate becomes immediately vested without any act to be done by him who is next in expectancy. But an estate upon condition enures beyond the time such contingency happens, unless advantage be taken of the breach to make an entry or avoid the estate (*f*).

The conditions which are met with in leases are for the most part conditions subsequent, being stipulations for the cesser of the term upon the happening of certain events. They are usually contained in the body of the deed of lease, but are of equal efficacy if indorsed upon the deed before its execution (*g*), or if contained in another deed of even date (*h*). As in the case of covenants, the use of the word is not confined to demises under seal (*i*).

Conditions distinguished from covenants.—Subject to the right to relief from forfeiture now given to the lessee by statute (*k*), upon breach of a condition the lessor may re-enter, because the

(*b*) Co. Lit. 201 a; 2 Black. Comm. 154.

(*c*) *Ante*, p. 107.

(*d*) *Belaney v. Kelly*, 24 L. T. 738. See also the judgments therein as to the effect of a further limitation based on the approval by certain specified persons of the manner in which the duties of the office of agent were performed.

(*e*) 2 Black. Comm. 155.

(*f*) *Id.* See *infra*, p. 322.

(*g*) *Griffin v. Stanhope*, Cro. Jac. at p. 456. See p. 339, *post*.

(*h*) Com. Dig. Condition (A. 9).

(*i*) *Doe v. Watt*, 8 B. & C. 308; *Doe v. Amey*, 12 A. & E. 476; *Hayne v. Cummings*, 16 C. B. N. S. 421.

(*k*) See *post*, pp. 657 *et seq.*

estate of the lessee is determined (*l*); whereas a breach of covenant only gives him the right to recover damages (*m*) (or to obtain an injunction (*n*)), unless the right to re-enter is expressly reserved to him by the lease (*o*). It becomes consequently often material to know whether a given stipulation operates as a condition or only as a covenant. Mere words of agreement will not amount to a condition (*p*); for the latter to result, either the word itself in one form or another—*e.g.*, “it is stipulated and conditioned” (*q*), or “these presents are upon the express condition” (*r*)—must be used, or the stipulation must clearly show that its non-fulfilment was intended to defeat the term, *e.g.*, where it commences with the word “provided” (*s*), and contains no other penalty for the breach (*t*). Where there are things to be done on both sides (*e.g.*, where the lessee undertakes to give up part of the premises on reduction of rent by the lessor), such an undertaking is *primâ facie* a covenant (*u*), and not a condition (*x*); but a *proviso* to the like effect which expressly gives the lessor power to take possession of the portion agreed to be given up (*y*) does not operate by way of covenant merely (*z*).

It follows from what has been said that the right of re-entry may accrue in one of two ways—by breach of a condition, and by breach of a covenant to which the proviso for re-entry is applicable. The question whether a stipulation, be it covenant or be it condition, has been broken or not is one to be decided in the ordinary manner by reference to the intention of the parties as expressed by the language they have used (*a*); though, if the lessor seek to re-enter, he must give strict proof of the breach, as the estate will not be divested from the lessee till the forfeiture be conclusively shown (*b*). In order to incur and enforce a forfeiture, the event upon which it is to arise must, as it has been said, be fully established, forfeiture being a matter *stricti juris* (*c*): so that where, for

(*l*) See under last head.

(*m*) See *ante*, p. 139.

(*n*) *Ante*, pp. 259, 281, 288, 295–7.

(*o*) See next paragraph.

(*p*) *Shaw v. Coffin*, 14 C. B. N. S. 372.

(*q*) *Doe v. Wall*, *supra*.

(*r*) See *Brookes v. Drysdale*, 3 C. P. D. 52.

(*s*) Co. Lit. 203 b.

(*t*) *Simpson v. Titterell*, Cro. Eliz. 242.

(*u*) *Doe v. Abel*, 2 M. & S. 541.

(*z*) *Doe v. Phillips*, 2 Bing. 13, per Burrough, J.

(*y*) *Johnson v. Edgware, &c., Ry. Co.*, 35 Beav. 480.

(*a*) *Doe v. Kennard*, 12 Q. B. 244.

(*b*) *Goodtitle v. Saville*, 16 East, at p. 95, per Lord Ellenborough, C. J.; *Doe v. Elsam*, Moo. & M. 189; *Doe v. Gladwin*, 6 Q. B. 953, per Patteson, J.; *Corporation of Bristol v. Westcott*, 12 Ch. Div. 461.

(*c*) *Doe v. Whitehead*, 8 A. & E. 571; *Doe v. Robson*, 2 C. & P. 245; *Toleman v. Portbury*, L. R. 5 Q. B. 288.

(*c*) Per Holroyd, J., in next-cited case.

instance, a condition provided for re-entry on any assignment of the tenant's interest, it was held that no forfeiture had accrued by an assignment which turned out to be invalid (*d*). So where a lessee's covenants were expressed to have been entered into on behalf of himself, "his heirs, executors, administrators, *and assigns*," and what would have been a breach of one of them if committed by the lessee had been committed by an underlessee, a similar result was held to ensue (*e*). (Nor can the lessor re-enter if by his conduct he has misled the lessee into the commission of the act of forfeiture (*f*).) The further question whether, if such stipulation be only a covenant (if a condition, it does not of course arise) and a breach have been committed, the right of re-entry has accrued, or, in other words, whether the clause of re-entry applies to the particular covenant alleged to have been broken, is one in the solution of which the courts have uniformly adopted a strict construction of the proviso (*g*).

Thus the proviso, for instance, will not be construed to apply to any covenant when such proviso is altogether ungrammatical and insensible (*h*), unless the defect or omission, being due to a mere clerical error, is one that can be clearly rectified (*i*). So a proviso for re-entry for breach of covenants by the lessee "thereinafter" contained will not apply to a covenant which occurs in the lease before the proviso where there is no covenant by the lessee occurring after it, even though there be a covenant so occurring by the lessor for quiet enjoyment upon the lessee performing all his covenants (including the one in question) "thereinbefore" contained (*k*). (But if the proviso apply in terms to a breach of *any* of the covenants, the mere fact that in addition it enumerates them, but not all of them, will not prevent it from applying to a covenant not included in the enumeration (*l*).) So an agreement for a lease to contain a specified covenant and other covenants of a head lease, which contains a proviso for re-entry on breach of covenants generally, but does not contain the specified covenant, will not entitle the lessor to re-enter on breach of that covenant (*m*). On the same principle, where the proviso is

(*d*) *Doe v. Powell*, 5 B. & C. 308.

(*e*) *Villiers v. Oldcorn*, 20 T. L. R. 11.

(*f*) *Doe v. Rowe*, 2 C. & P. 246; *Doe v. Sutton*, 9 C. & P. 706. Cp. *Doe v. Eykins*, 1 C. & P. 154.

(*g*) In consequence, however, of the large powers now possessed by the Court to relieve against forfeiture (*post*,

p. 657), this question has no longer the same importance as it formerly had.

(*h*) *Doe v. Carew*, 2 Q. B. 317.

(*i*) See *Hunt v. Bishop*, 8 Exch. 675.

(*k*) *Doe v. Godwin*, 4 M. & S. 265.

(*l*) *Doe v. Jepson*, 8 B. & Ad. 402.

(*m*) *Crawley v. Price*, L. R. 10 Q. B. 302.

expressed to take effect upon the *commission* by the tenant of an act in breach of any of the covenants, it will not, as it has been held, apply to a covenant broken by a mere *omission*, e.g., to repair (*n*). But it is now settled (after many conflicting *dicta* on the subject (*o*)) that where the proviso entitles the lessor to re-enter only in the event of the tenant failing to “perform” his covenants, negative as well as positive obligations are comprised within it (*p*)—in the absence of special circumstances showing an intention to the contrary (*q*),—for the obligation to abstain from doing something may properly be said to be “performed” by not doing it (*r*); and the same thing holds good where the proviso is expressed to take effect on “breach” of any of the covenants simply (*s*).

The above principle, however, will not prevent the lessor of two or more houses comprised in a single lease, and subject to common covenants and a common proviso for re-entry, from enforcing such proviso against an underlessee of one house for breach of a covenant relating to another (*t*).

Besides its application to breaches of covenant, the proviso for re-entry is often made to extend to the case (*u*) where the lessee commits an act of bankruptcy upon which adjudication follows (*x*), or where the term is taken in execution (*y*). A proviso in the event of the lessee filing a petition in liquidation has been held to take effect upon the presentation by him of a petition in bankruptcy (*z*); but a proviso for re-entry upon the lessee committing an act of bankruptcy, under a commission or fiat upon which he should be *duly* found bankrupt, does not apply where the adjudication in bankruptcy turns out to be invalid (*a*). Where a lease,

(*n*) *Doe v. Stevens*, 3 B. & Ad. 299. The words were “if the lessee should do or cause to be done any act, matter, or thing whatsoever contrary to or in breach of” any of the covenants.

(*o*) These will be found referred to in the case next cited.

(*p*) *Harman v. Ainslie*, [1904] 1 K. B. 698.

(*q*) *Doe v. Marchetti*, 1 B. & Ad. 715. The proviso here was expressed to take effect on default in performance of the covenants after thirty days’ notice.

(*r*) Per Collins, M. R., in *Harman v. Ainslie*, *supra*.

(*s*) *Wadham v. Postmaster-General*, L. R. 6 Q. B. 644, per Blackburn, J.

(*t*) *Darlington v. Hamilton*, Kay, 550;

Creswell v. Davidson, 56 L. T. 811; *Kelly v. Rogers*, [1892] 1 Q. B. 910.

(*u*) As to statutory relief in these events, see *post*, p. 668.

(*x*) *Roe v. Galliers*, 2 T. R. 183; *Doe v. Rees*, 4 Bing. N. C. 384; *Dyke v. Taylor*, 3 D. F. & J. 467. The reason for the introduction of the proviso against bankruptcy into leases is that the ordinary covenant against assignment was held (*ante*, p. 278) not to apply to the involuntary assignment which results from bankruptcy: *Doe v. Ingleby*, *infra*, per Platt, B.

(*y*) *R. v. Topping*, M’Cl. & Y. 544.

(*z*) *Ex parte Gould*, 13 Q. B. D. 454 (reported as *Re Walker*, 51 L. T. 368). Cf. Bankruptcy Act, 1883, s. 149, sub-s. 2.

(*a*) *Doe v. Ingleby*, 15 M. & W. 465.

which permitted assignment only with the lessor's consent, contained a proviso for re-entry "if the lessee, his executors, administrators, or assigns shall become bankrupt," it was held that this clause referred only to the bankruptcy of the person for the time being possessed of the term (*b*); hence where the lessee assigned over with the necessary consent, it was held that a subsequent adjudication against him in bankruptcy did not entitle the lessor to enforce his right of re-entry against the assignee (*c*). So, a proviso "if the lessee, his executors, administrators, or assigns," shall become bankrupt, comes into force when—the lessee having died and bequeathed the term to his executors upon trust—the surviving executor has become bankrupt (*d*). In the same way, a proviso "if the lessee should incur any debt on which any judgment should be entered up against him, and on which any writ of execution should be issued," was held to come into operation upon the lessee giving a warrant of attorney on which judgment was entered up and execution issued against his goods (*e*); and a proviso for re-entry in case the term should be "extended or taken in execution" takes effect upon a seizure of the lessee's interest by the sheriff under a writ of extent against him at the suit of the Crown (*f*).

Where a building agreement provided that in the event of the lessee's bankruptcy the lessor might re-enter (*g*), and that all materials and effects on the land should be absolutely forfeited, it was held on the lessee's bankruptcy (no default having been previously made by him in the performance of the agreement) that the stipulation as to forfeiture of the building materials was void as contrary to the policy of the bankruptcy law, and that such materials passed to the trustee (*h*).

Where lands are demised to a company, provision is often made for enabling the lessor to re-enter if the company should be wound up; and when this is the case the right accrues on the making of the winding-up order, and is not suspended until the winding-up is completed (*i*). A proviso for re-entry upon the "liquidation, whether compulsory or voluntary," of a company does not necessarily intend a liquidation in consequence of insolvency or for the benefit of creditors, but has been held to apply to the case

(*b*) Per Wright, J., in next-cited case.

(*c*) *Smith v. Gronow*, [1891] 2 Q. B. 394.

(*d*) *Doe v. David*, 1 C. M. & R. 405.

(*e*) See *Davis v. Eyton*, 7 Bing. 154.

(*f*) *R. v. Topping*, *supra*.

(*g*) As to this, see now *post*, p. 668.

(*h*) *Ex parte Jay*, 14 Ch. Div. 19.

(*i*) *General Share, &c., Co. v. Welley Brick Co.*, 20 Ch. Div. 260.

where the company goes into liquidation merely for the purpose of increasing its capital and of being reconstructed (*k*), or of being amalgamated with other companies (*l*).

For whose benefit enuring.—At common law, the only person entitled to the benefit of a proviso is the person who has granted the lease, or his heirs or executors (*m*) (and if there be more than one lessor those only can exercise the right to whom it has been reserved by the lease (*n*)); but this privilege has been extended by statute, so far as covenants and conditions are concerned which “run with the land” (*o*), to all grantees of the reversion (*p*), who may avail themselves of it (except in the case of non-payment of rent) without giving notice of their assignment to the tenant (*q*). A mere right of re-entry, however, cannot in itself be granted or assigned, for the enactment which provides that a right of entry may be disposed of by deed (*r*) does not apply to a right accruing upon a forfeiture in a lease (*s*).

A person who demises for his whole interest—a conveyance which, if made by deed, amounts, as will be seen, to an assignment (*t*)—may, if he expressly reserve to himself the right, take advantage of the proviso, though he has thus parted with his reversion (*u*); but, apart from this case, no person may avail himself of its benefit unless he be entitled to the reversion at the time (*x*). Nor at common law could the right of re-entry be exercised by any person unless the immediate legal reversion were vested in him (*y*) (e.g., by a mortgagor or *cestui que trust*), even though, being possessed of an equitable interest, he were a party to the demise (*z*), though the rent were reserved to him alone (*a*), and though the proviso expressly conferred the right upon him (*b*). And notwithstanding that the Judicature Act contains a provision (*c*) specifically enabling a mortgagor entitled to the

(*k*) *Horsey Estate v. Steiger*, [1899] 2 Q. B. 79.

(*l*) *Ewart v. Fryer*, [1901] 1 Ch. 499; affd. (H. L.), *Fryer v. Ewart*, [1902] A. C. 187 (reported as *Watney v. Ewart*, 86 L. T. 242).

(*m*) Litt. s. 347; Co. Lit. 214 b.

(*n*) *Saunders v. Merryweather*, 3 H. & C. 902.

(*o*) *Post*, p. 417.

(*p*) 32 Hen. 8, c. 34. See this matter discussed *post*, p. 432.

(*q*) *Scoltock v. Harston*, 1 C. P. D. 106. See *post*, pp. 438, 463.

(*r*) 8 & 9 Vict. c. 106, s. 6.

F.

(*s*) *Hunt v. Bishop*, 8 Exch. 675; *Hunt v. Remnant*, 9 Exch. 635.

(*t*) *Post*, p. 413.

(*u*) *Doe v. Bateman*, 2 B. & A. 168.

(*x*) *Doe v. Edwards*, 5 B. & Ad. 1065; *Fenn v. Smart*, 12 East, 444.

(*y*) *Doe v. Lawrence*, 4 Taunt. 23. *Capital & Counties Bank v. Rhodes*, [1903] 1 Ch. 631, may be referred to as a good modern illustration of the rule.

(*z*) *Doe v. Goldsmith*, 2 C. & J. 674.

(*a*) *Saunders v. Merryweather*, 3 H. & C. 902.

(*b*) *Doe v. Adams*, 2 C. & J. 232.

(*c*) 36 & 37 Vict. c. 66, s. 25, sub-s. (5).

Y

possession of land to sue for such possession where no notice of an intention to take possession has been given by the mortgagee, it has been decided that this does not give to a mortgagor any power of re-entry which he did not possess before, and consequently does not give to him, if in possession subject to a lease, any right to re-enter for breach of the covenants therein contained (*d*). But, so far as leases made after the year 1881 are concerned, the Conveyancing Act (*e*) would perhaps apply, and if so the above statement of the law would no longer hold good (*f*).

It is expressly provided by statute that the benefit of a condition, like that of a covenant (*g*), may be taken, though the taker thereof be not named as a party to the indenture (*h*).

In no case can the *lessee* take advantage of the proviso for re-entry in order to avoid the lease, even where it is in the form (not that the lessor may re-enter, but) that the term shall cease (*i*), or that the lease shall be void for all purposes (*k*); for it is well settled that expressions of this kind only mean that the tenancy shall determine at the option of the lessor (*i.e.*, shall be voidable and not void (*l*)), and *à fortiori* when it is added that it shall be lawful for the lessor thereupon to re-enter (*m*). It follows that where the proviso makes the lease void, the landlord must, in order to take advantage of it, do some unequivocal act notified to the lessee indicating his intention to avail himself of the option given to him (*n*). The service upon the lessee in possession of a writ in ejectment is sufficient (*o*), and actual or constructive entry is not required, the lease being determined once for all by service of the writ (*n*).

Where, however, the proviso merely reserves to the lessor a right to re-enter, entry, actual or confessed (as in the old proceedings in ejectment (*o*)), or some equivalent act, such as letting the premises to a new tenant found in occupation by the lessor (*p*), was formerly held necessary (*n*), and the lease was avoided only from the time of

(*d*) *Matthews v. Usher*, [1900] 2 Q. B. 535.

(*e*) 44 & 45 Vict. c. 41, s. 10.

(*f*) See *post*, p. 439. This section would seem to have escaped attention in *Molyneux v. Richard*, [1906] 1 Ch. 34 (see at p. 43 of the report). In *Matthews v. Usher*, *supra*, the lease was before the Act, which was consequently inapplicable.

(*g*) *Ante*, p. 138.

(*h*) 8 & 9 Vict. c. 106, s. 5.

(*i*) *Reid v. Parsons*, 2 Chit. 247.

(*k*) *Reid v. Farr*, 6 M. & S. 121; *In re Tickle*, 3 Morr. 126.

(*l*) *Doe v. Bancks*, 4 B. & A. 401; *Roberts v. Davey*, 4 B. & Ad. 664; *Doe v. Birch*, 1 M. & W. 402; *Davenport v. R.*, 3 App. Ca. 115.

(*m*) *Arnaby v. Woodward*, 6 B. & C. 519; *Bousser v. Colby*, 1 Hare, 109.

(*n*) *Jones v. Carter*, 15 M. & W. 718, per Parke, B. See *post*, pp. 651, 656.

(*o*) *Goodright v. Cator*, 2 Doug. 477.

(*p*) *Baylis v. Le Gros*, 4 C. B. N. S. 537.

re-entry (*q*); but in the present practice under the Judicature Acts it is no longer required (*r*).

It will be seen hereafter that where proceedings are brought (in the case of non-payment of rent) under the special powers of the Common Law Procedure Act, 1852, actual re-entry is likewise dispensed with (*s*).

Period of operation.—A proviso for re-entry can only operate during the term (*t*), though it will extend to the yearly tenancy implied from the payment of rent by a tenant who holds over after the expiration of his term (*u*); and it extends also to the yearly tenancy implied (now only where there is no claim to specific performance (*x*)) from the payment of rent under an inoperative lease or agreement (*y*).

For the purposes of the Statute of Limitations, time begins to run from the commission of the act of forfeiture or breach of condition, though where the forfeiture is not enforced a fresh right accrues to the reversioner at, and time begins to run with, the termination of the lease (*z*). Whether a proviso of re-entry on non-payment of rent continues enforceable *during the running of a lease* after payment of rent has ceased for a period exceeding that allowed by the Statute does not seem clear. The true view would appear to be that a new right of re-entry accrues each time a forfeiture is incurred, and that time consequently begins to run afresh on each occasion a fresh default in payment is made (*a*).

The effect of the exercise of the right of re-entry will be considered hereafter (*b*).

(*q*) *Hartshorne v. Watson*, 4 Bing. N. C. 178.

(*r*) *Ware v. Booth*, 10 T. L. R. 446; *Serjeant v. Nash*, [1903] 2 K. B. 304. In *Ex parte Dyke*, 22 Ch. Div. 410, the point had been left undecided.

(*s*) 15 & 16 Vict. c. 76, s. 210. See *post*, p. 671.

(*t*) *Johns v. Whitley*, 3 Wils. at p. 140.

(*u*) *Thomas v. Packer*, 1 H. & N. 669. See *post*, p. 396.

(*x*) *Ante*, pp. 10–15.

(*y*) *Doe v. Amey*, 12 A. & E. 476; *Doe v. Breach*, 6 Esp. 106.

(*z*) 3 & 4 Will. 4, c. 27, ss. 3 (*ad fin.*), 4. See *post*, p. 683.

(*a*) See Darby and Bosanquet on the Statute of Limitations, p. 338 (2nd ed.). Lord St. Leonards, however (*Sugd. New Property Statutes* (2nd ed.), p. 43), has lent his authority to the view that the right to enforce the proviso during the lease is under the circumstances lost.

(*b*) *Post*, p. 650.

CHAP. I.—THE LEASE (*continued*).

DIV. VIII.—MISCELLANEOUS OBSERVATIONS ON LEASES.

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The stamp.—Instruments of demise must, by virtue of the Stamp Act, 1891 (*c*), be properly stamped, otherwise (subject to the right of stamping on payment of specified penalties (*d*)) they cannot be admitted in evidence in any civil proceedings (*e*), and the lessee further exposes himself to a fine of 10*l.* (*f*). But where an instrument bearing a single lease stamp contained a demise in general terms with a several operation in respect to the different tenants who signed it for different estates and at the different rents set against each of their signatures, it was held that it was matter of evidence to which demise the stamp applied, and that consequently it was admissible in an action in which that demise alone came in question, though unstamped in respect of all the others (*g*).

Even a lease which, being for a term not exceeding three years, may be validly made by parol (*h*), must, if in writing, bear a stamp (*i*); though where such a lease is made by parol, a written offer as to a particular term of the taking may be given in evidence, even if unstamped, not as the instrument of letting itself, but as a mere step or link in the proof of it (*k*). Nor if a written instrument of letting be unstamped, can recourse be had to oral evidence where, *e.g.*, in an action for rent, in the absence of writing, such evidence would have been admissible to establish the claim (*l*). So an instrument of letting which contained an agreement to purchase

(*c*) 54 & 55 Vict. c. 39. Only matters relating specifically to leases are treated of here. See also pp. 391, 392, *post*.

(*d*) Sect. 15 (1).

(*e*) Sect. 14 (4). The words, it should be noticed, of the present Act are "shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever."

(*f*) Sect. 15 (2).

(*g*) *Doe v. Day*, 13 East, 241.

(*h*) *Ante*, p. 10.

(*i*) Bull. N. P. 269.

(*k*) *Bethell v. Blencowe*, 3 M. & Gr. 119.

(*l*) *Brewer v. Palmer*, 3 Esp. 213.

fixtures was, in an action to recover their price, held inadmissible, because insufficiently stamped as a lease, though stamped as an agreement (*m*). But an instrument purporting to be a lease, if not executed by the lessor (*n*), does not require a stamp as such (*o*).

Contrary to the usual rule which requires all stamp duties to be denoted by impressed stamps only (*p*), "the duty upon an instrument chargeable with duty as a lease or tack of any dwelling-house or part of a dwelling-house for a definite term not exceeding a year at a rent not exceeding the rate of 10*l.* per annum, or any furnished dwelling-house or apartments for any definite term less than a year (and upon the duplicate or counterpart of any such instrument), may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is first executed"; and, "every person who executes, or prepares or is employed in preparing, any such instrument (except letters or correspondence) which is not, at or before the execution thereof, duly stamped, shall incur a fine of 5*l.*" (*q*).

The following are the duties specified in the 1st schedule of the Stamp Act, as required upon a lease or tack:—

- | | |
|--|---|
| (1) For any definite term not exceeding a year:— | £ s. d. |
| Of any dwelling-house, or part of a dwelling-house, at a rent not exceeding the rate of £10 per annum | 0 0 1 |
| (2) For any definite term less than a year:— | |
| (a) Of any furnished dwelling-house or apartments where the rent for such term exceeds £25 | 0 2 6 |
| (b) Of any lands, tenements, or heritable subjects, except or otherwise than as aforesaid | <div style="display: inline-block; vertical-align: middle;"> <div style="font-size: 2em; vertical-align: middle; line-height: 1;">{</div> <div style="display: inline-block; vertical-align: middle; padding-left: 5px;"> The same duty as a lease for a year at the rent reserved for the definite term. </div> </div> |
| | |
| (3) For any other definite term, or for any indefinite term:— | |
| Of any lands, tenements, or heritable subjects— | |
| Where the consideration, or any part of the consideration, moving either to the lessor, or to any other person, consists of any money, stock, or security: | |

(*m*) *Corder v. Drakeford*, 3 Taunt. 382. may, however, require stamping as an agreement.
 (*n*) See p. 21, ante. (*p*) 54 & 55 Vict. c. 39, s. 2.
 (*o*) *Doe v. Wiggins*, 4 Q. B. 367. It (*q*) *Id.*, s. 78, sub-ss. (1) and (2).

In respect of such consideration

{ The same duty
as a conveyance
on a sale for
the same con-
sideration.

Where the consideration, or any part of the considera-
tion, is any rent:

In respect of such consideration:

If the rent, whether reserved as a yearly rent or
otherwise, is at a rate or average rate:

	If the term does not exceed 35 years, or is indefinite.			If the term exceeds 35 years but does not exceed 100 years.			If the term exceeds 100 years.		
	£	s.	d.	£	s.	d.	£	s.	d.
Not exceeding £5 per annum	0	0	6	0	3	0	0	6	0
Exceeding—									
£5 and not exceeding £10	0	1	0	0	6	0	0	12	0
£10 " " £15	0	1	6	0	9	0	0	18	0
£15 " " £20	0	2	0	0	12	0	1	4	0
£20 " " £25	0	2	6	0	15	0	1	10	0
£25 " " £50	0	5	0	1	10	0	3	0	0
£50 " " £75	0	7	6	2	5	0	4	10	0
£75 " " £100	0	10	0	3	0	0	6	0	0
£100									
For every full sum of £50, and also for any fractional part of £50 thereof ..	0	5	0	1	10	0	3	0	0

(4) Of any other kind whatsoever not hereinbefore described £ s. d.
0 10 0

An instrument not under seal which is not an absolute demise, but which operates as a mere licence to exercise certain rights on property, with a stipulation that as long as the rights in question are permitted the grantors shall be entitled to receive certain moneys in payment, is not a "lease or tack" within the schedule of the Stamp Act (*r*).

An instrument of demise which includes different lettings to a given person (*s*) at different rents need not be stamped in respect of each letting separately, but will satisfy the stamp laws if it bear an *ad valorem* stamp in respect of the total sum reserved as rent (*t*), provided the whole matter be *bonâ fide* intended as one transaction between the parties (*u*); nor does it necessarily make any difference

(*r*) *Thames Conservators v. Commissioners of Inland Revenue*, 18 Q. B. D. 279.

(*s*) *Secus*, if to different persons: see *Doe v. Day*, 13 East, 241, cited *supra*, p. 324.

(*t*) *Coster v. Cowling*, 7 Bing. 456 (demise of a house and land, with separate rent for furniture and fixtures).

(*u*) *Boase v. Jackson*, 3 B. & B. 185; *Parry v. Deere*, 5 A. & E. 551.

that the length of the term or the covenants entered into in the respective lettings are different (*x*).

Where an instrument of demise deals with matters distinct from the lease, *e.g.*, the sale of stock-in-trade (*y*), such separate matters require a distinct stamp (*z*). But where it merely contains an option of purchase to the lessee (*a*), the agreement of sale is sufficiently connected with the consideration for the lease to render any stamp beyond that in respect of the lease unnecessary (*b*); though if such agreement be not merely accessory to the demise, as where the option extends to premises not the subject of the demise at all, this is otherwise (*c*). Similarly, where a third person became party to a lease as surety for payment of the rent by the lessee, all the other covenants being entered into with the landlord by the latter only, it was held that a lease stamp was sufficient, because the primary intention of the parties was that the instrument should be a lease and nothing else (*d*). And where, on the other hand, in a lease under which penalties in certain events became payable by the lessee there was a distinct agreement on the part of a third person to guarantee payment of them to a stipulated amount, it was held that a stamp was required to cover both the lease and the guarantee (*e*).

"A lease or tack, or agreement for a lease or tack, or with respect to any letting, is not to be charged with any duty in respect of any penal rent (*f*) or increased rent in the nature of a penal rent thereby reserved or agreed to be reserved or made payable" (*g*). And "an instrument whereby the rent reserved by any other instrument, chargeable with duty and duly stamped as a lease or tack, is increased is not to be charged with duty otherwise than as a lease or tack in consideration of the additional rent thereby made payable" (*h*).

A lease or agreement is not to be charged with any duty "by reason of being made in consideration of the surrender or abandonment of any existing lease, tack, or agreement of or relating to the same subject-matter" (*i*).

"A lease made for any consideration in respect whereof it is

(*x*) *Blount v. Pearman*, 1 Bing. N. C. 408.

(*y*) *Clayton v. Burtenshaw*, 5 B. & C. 41, per Littledale, J.

(*z*) 54 & 55 Vict. c. 39, s. 4. See *British Electric Traction Co. v. Commissioners of Inland Revenue*, *infra*.

(*a*) As to this, see *ante*, p. 312.

(*b*) *Worthington v. Warrington*, 5 C. B. 635.

(*c*) *Loveloock v. Franklyn*, 8 Q. B. 371.

(*d*) *Price v. Thomas*, 2 B. & Ad. 218.

(*e*) *Wharton v. Wallon*, 7 Q. B. 474.

(*f*) See *ante*, pp. 154—157.

(*g*) 54 & 55 Vict. c. 39, s. 77, sub-s. (1).

(*h*) *Id.*, sub-s. (5).

(*i*) *Id.*, sub-s. (1).

chargeable with *ad valorem* duty, and in further consideration either of a covenant by the lessee to make, or of his having previously made, any substantial improvement of or addition to the property demised to him, or of any covenant relating to the matter of the lease, is not to be charged with any duty in respect of such further consideration" (k). The object of this clause is to relieve from charge all covenants fairly within the scope of the lease, and being part of the consideration for the lease (l).

"No lease for a life or lives not exceeding three, or for a term of years terminable with a life or lives not exceeding three, and no lease for a term absolute not exceeding twenty-one years, granted by an ecclesiastical corporation, aggregate or sole, is to be charged with any higher duty than 35s." (m).

"Where the consideration or any part of the consideration for which a lease or tack is granted or agreed to be granted consists of any produce or other goods, the value of the produce or goods is to be deemed a consideration in respect of which the lease or tack or agreement is chargeable with *ad valorem* duty"; and "where it is stipulated that the value of the produce or goods is to amount at least to, or is not to exceed, a given sum, or where the lessee is specially charged with or has the option of paying after any permanent rate of conversion, the value of the produce or goods is, for the purpose of assessing the *ad valorem* duty, to be estimated at the given sum or according to the permanent rate" (n).

"A lease or tack or agreement for a lease or tack made either wholly or partially for any such consideration, if it contains a statement of the value thereof, and is stamped in accordance with the statement, is, so far as regards the subject-matter of the statement, to be deemed duly stamped, unless or until it is otherwise shown that the statement is incorrect, and that the lease or tack or agreement is in fact not duly stamped" (o).

The onus of showing that a lease is not duly stamped lies on the party who impeaches it; hence, where a lease which reserved a certain rent contained a stipulation that the landlord should insure the premises for a specified sum, and that the premiums should be added to the rent, it was held that it lay upon the party objecting to the admission in evidence of the lease, to show that the total of rent and premiums exceeded the sum covered by the stamp (p).

(k) 54 & 55 Vict. c. 39, s. 77, sub-s. (2).
(l) *British Electric Traction Co. v. Commissioners of Inland Revenue*, [1902] 1 K. B. 441, per Collins, M. R.

(m) 54 & 55 Vict. c. 39, s. 77, sub-s. (3).
(n) Sect. 76, sub-ss. (1) and (2).
(o) *Id.*, sub-s. (3).
(p) *Wilson v. Smith*, 12 M. & W. 401.

Where an instrument of letting is altered in a material particular (*q*), a new instrument is thereby substituted for it, and a fresh stamp consequently becomes necessary (*r*). But where the alteration is superfluous, as one merely expressing what was already implied, this is otherwise (*s*).

Sometimes a letting is made by reference to an instrument already in existence. The fact that a lease properly stamped refers for its terms to another instrument which is unstamped, does not render it impeachable if it incorporates the latter so that the whole may be regarded as one document (*t*). But an unstamped instrument cannot be given in evidence to prove a parol letting upon the terms contained in it (*u*).

The *counterpart* of a lease requires the same stamp as the lease itself where the duty payable in respect of the latter does not exceed 5s., and a stamp of 5s. where it does (*x*). Such counterpart, if unexecuted by or on behalf of the lessor, is expressly excepted from the operation of the rule that a counterpart "is not to be deemed duly stamped unless stamped as an original instrument, or unless it appears by some stamp impressed thereon that the full and proper duty has been paid upon the original instrument of which it is the counterpart" (*y*). A lessee who executes the counterpart cannot impeach its validity on the ground that the original lease has not been properly stamped (*z*); so that in an action by the lessor, production of an instrument bearing a counterpart stamp and proof of its execution by the lessee is, as against him, sufficient without proof of execution of a lease by the former (*a*),—a rule which also applies in proceedings brought against an assignee (*b*), or against a stranger (*c*). It has already been mentioned that in case of a discrepancy between lease and counterpart, the general rule, in the case of instruments under seal, is that the former prevails over the latter (*d*).

Registration.—When premises demised are situated in (*a*) Middlesex, (*b*) Yorkshire, or (*c*) the Bedford Level, the lease must, in conformity with certain statutes, be registered (*e*). Leaseholds

(*q*) See *infra*, p. 338.

(*r*) *Atherstone v. Boslock*, 2 M. & Gr. 511; Tilsley on the Stamp Laws, p. 306 (3rd ed.).

(*s*) *Doe v. Houghton*, 1 M. & Ry. 208.

(*t*) *Pearce v. Cheslyn*, 4 A. & E. 225.

(*u*) *Turner v. Power*, 7 B. & C. 625.

(*x*) 54 & 55 Vict. c. 39, 1st sched.

(*y*) 54 & 55 Vict. c. 39, s. 72.

(*z*) *Paul v. Meek*, 2 Y. & J. 116.

(*a*) *Hughes v. Clark*, 10 C. B. 905; *Houghton v. Koenig*, 18 C. B. 235.

(*b*) *Roe v. Davis*, 7 East, 963.

(*c*) *Homes v. Pearce*, 1 F. & F. 283.

(*d*) *Shep. Touch*, 53; *ante*, p. 118.

(*e*) See also pp. 413, 414, *post*.

may also be registered under the Land Transfer Act, 1875 (*f*), in whatever county they are situated; but (subject to what is presently stated) this is not compulsory. Such registration, however, in respect of land situate in Middlesex or Yorkshire will dispense with registration under the local Acts presently considered (*g*).

But it is now specially enacted by the Land Transfer Act, 1897 (*h*), that provision may be made by general rules for applying to the grant of leases and dealings with leasehold land the provisions of the Act (*i*) with respect to compulsory registration (*k*); though nothing in the Act is to render compulsory the registration of the title to a lease having less than forty years to run or two lives yet to fall in (*l*). And such provision has been made by the Land Transfer Rules, 1903, which direct (*m*) that the Order in Council, which is necessary before any county or district can be brought within the scope of the Act (*n*), shall, in the absence of anything to the contrary expressed therein, extend to grants of leases and underleases (*o*). The effect of an Order so made, as regards land in the county or district comprised in the Order, is that a grant of a lease or underlease for a term of forty years or more, or for two or more lives, executed after the day specified in the Order and capable of registration, shall operate only as an agreement, and shall not pass any legal estate to the lessee unless or until he is registered as proprietor of the lease or underlease (*p*).

In order to see what leases are "capable of registration," reference must be made to the Act of 1875. That Act provides (*q*) that a separate register is to be kept of leasehold land, and any person (amongst others) entitled for his own benefit at law or in equity to leasehold land held under a lease (*r*) for a life or lives, or determinable on a life or lives, or for a term of years of which more than twenty-one are unexpired, whether subject or not to

(*f*) 38 & 39 Vict. c. 87 (superseding 25 & 26 Vict. c. 53), s. 11, as amended by 60 & 61 Vict. c. 65, 1st sched. See *infra*.

(*g*) Sect. 127, amended by 60 & 61 Vict. c. 65, 1st sched.

(*h*) 60 & 61 Vict. c. 65.

(*i*) Sect. 20.

(*k*) Sect. 22. As to the general effect of registration in the transfer of land—a matter beyond the scope of the present treatise—see the judgment of the C. A. in *Capital & Counties Bank v. Rhodes*, [1903] 1 Ch. 631.

(*l*) Sect. 24.

(*m*) R. 68.

(*n*) 60 & 61 Vict. c. 65, s. 20. The approval of the County Council is required before the Order can be made.

(*o*) See this latter expression defined in r. 70.

(*p*) L. T. Rules, 1903, r. 69. (See, as to the consequences of this, p. 17, *ante*.) The rule contains a saving clause where lessees are trustees of a settlement under the Settled Lands Act.

(*q*) 38 & 39 Vict. c. 87, s. 11, as amended by r. 67.

(*r*) By 60 & 61 Vict. c. 65, 1st sched., this includes a sub-lease, but not a term created for mortgage purposes. As to reversionary leases, see r. 66.

incumbrances (*s*), may apply for registration as proprietor of such land (*t*). Land, however, held under a lease containing an absolute prohibition against alienation is not to be registered at all (*u*); and if it be held under a lease containing a prohibition against alienation without licence it is not to be registered unless entry is made on the register of a restriction to that effect (*x*).

Application—governed by the same provisions generally as in regard to freeholds (*y*)—may be made for the registration of leasehold land with absolute title, with good leasehold title, or with possessory title (*z*); the lease, where it is in the possession or under the control of the applicant, and in other cases a copy or abstract of it, or other sufficient evidence of its contents, being delivered with the application (*a*). The effect of registration of a person as first proprietor of leasehold land with an absolute title (*b*) is to vest in him the possession of the land comprised in the registered lease relating to such land for all the leasehold estate therein described, with all implied or expressed rights, privileges, and appurtenances attached to such estate, free from all estates and interests whatsoever, except—(*a*) all implied and expressed covenants, obligations, and liabilities incident to such leasehold estate; (*b*) the incumbrances (if any) entered on the register; (*c*) (where there is no entry to the contrary in the register) such liabilities, rights, and interests as affect the leasehold estate and are by the Act declared (*c*) not to be incumbrances in the case of registered freehold land; (*d*) (where such first proprietor is not entitled for his own benefit to the land registered, as between himself and any persons claiming under him) any unregistered estates, rights, interests, or equities to which such persons may be entitled (*d*). The registration of a person as first proprietor of leasehold land with a good leasehold title—in which case the title to the leasehold interest must be approved by the registrar (*e*)—

(*s*) As to what these are, see sect. 18, as amended by 60 & 61 Vict. c. 65, 1st sched.

(*t*) As to registration by lessees of *notice of leases and agreements* against their lessors' title, see ss. 50, 51; Rules, 1903, rr. 201—206.

(*u*) Sect. 11.

(*x*) *Id.* See Rules, 1903, r. 62.

(*y*) R. 50.

(*z*) R. 52.

(*a*) R. 51.

(*b*) In this case the title both to the leasehold and to the freehold and to any

intermediate leasehold that may exist (see, as to this, r. 60) must first be approved by the registrar: r. 53. As to registration with qualified title, where an absolute title either of the lessor or of the lessee can be established only for a limited period or subject to certain reservations, see rr. 49, 58, 59.

(*c*) Sect. 18, as amended by 60 & 61 Vict. c. 65, 1st sched.

(*d*) 38 & 39 Vict. c. 87, s. 13, as amended by r. 55.

(*e*) R. 53. Where the original lessee is registered as first proprietor the title

is not to affect or prejudice the enforcement of any estate, right, or interest affecting or in derogation of the title of the lessor to grant the lease, but, save as aforesaid, is to have the same effect as registration with an absolute title (*f*). The registration of a person as first proprietor of leasehold land with a possessory title is not to affect or prejudice the enforcement of any estate, right, or interest (whether in respect of the lessor's title or otherwise) adverse to, or in derogation of, the title of such first registered proprietor and subsisting or capable of arising at the time of the registration of such proprietor, but save as aforesaid is to have the same effect as registration with an absolute title (*g*). Where a lease affecting land already registered is registered in pursuance of the rules, notice of the registration is to be given to the registered proprietor of the freehold land, or of the superior lease out of which the lease is granted, as the case may be (*h*). When leasehold land has been once registered the registration of subsequent transfers is also provided for by the Act of 1875 (*i*), the effect being to vest the possession in the transferee in a similar way to that in which the Act vests it (*k*) in the first registered proprietor.

(a) *Middlsex*.—By 7 Anne, c. 20, it is enacted (*l*) that a memorial of all conveyances whereby any lands, tenements, or hereditaments in that county may be in any way affected in law or equity, shall be registered, otherwise such conveyance shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration who complies with the requirements of the Act. Rules have been made (*m*) providing the form and manner in which the memorial is to be executed, attested, and proved (*n*). Registration of a subsequent assignment or mortgage of a lease is not registration of the lease (*o*). Leases at a rack-rent, and leases not exceeding twenty-one years (where they convey the actual possession and occupation), are expressly excepted from the purview of the Act (*p*), which, moreover, does not extend to copyholds (*q*). The Act, moreover, is not, after the

may be entered on his satisfying the registrar that he has not incumbered or dealt with the land except as disclosed, and no advertisement is necessary: r. 54.

(*f*) R. 56.

(*g*) R. 57.

(*h*) R. 63.

(*i*) See ss. 84—89, as modified by r. 60 and rr. 138—142.

(*k*) Cp. *supra*.

(*l*) Sect. 1.

(*m*) 54 & 55 Vict. c. 64, 1st sched.

(*n*) See in particular paragraphs 1—8, reproducing in substance ss. 5 and 6 of 7 Anne, c. 20; and see, further, Rules of 1892, rr. 2—7, made under 54 & 55 Vict. c. 64, s. 2.

(*o*) *Honeycomb v. Waldron*, 2 Str. 1064.

(*p*) 7 Anne, c. 20, s. 17.

(*q*) *Id.* Chambers in Serjeants' Inn, the Inns of Court and of Chancery are also exempted from the Act.

passing (*r*) of the Land Charges Act, 1900 (*s*), to apply (*t*) to any instrument made after that date and capable of registration under the latter Act or the Land Charges Registration Act, 1888 (*u*).

(*b*) *Yorkshire*.—The statute 47 & 48 Vict. c. 54 sets forth (*x*) a mode of registration for assurances relating to lands in Yorkshire, as well as certain rules to which the memorials are to conform (*y*); and provides (*z*) that all assurances (*a*) entitled to be registered under the Act shall, except in cases of actual fraud (*b*), have priority according to the date of registration, and not according to the date of the assurance or of its execution. Leases not exceeding twenty-one years, if accompanied by actual possession from the time they are made, are excepted from this Act (*c*), which, also, like the former, does not apply to copyholds (*d*).

(*e*) *Bedford Level*.—By 15 Car. 2, c. 17, no lease of lands forming any part of the Bedford Level shall be of any force (*e*) but from the time it is registered as directed by the Act. Leases for seven years or under in possession are however exempted from the scope of the statute (*e*). Notwithstanding, too, the express words of the section, its effect is, not to avoid a lease in case of non-registration as between the parties themselves (so as to defeat a claim for breach of the covenants contained in it), but, like the enactments already noticed, merely to postpone a party whose title is not, to subsequent claimants whose titles are, registered (*f*).

Costs of lease.—It is the ordinary practice (more especially, perhaps, in the larger towns (*g*)), for the lease to be prepared by the lessor's solicitor at the expense of the lessee.

(*A*) *Liability*.—As between lessor and lessee.—The lessor can consequently, in the absence of stipulation to the contrary, recover the costs he has incurred to his solicitor from the lessee (*h*), on the ground of implied assent by the latter to the employment of the

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| (<i>r</i>) 30th July, 1900. | 403 (reported as <i>In re Hobson</i> , 44 W. R. 615). |
| (<i>s</i>) 63 & 64 Vict. c. 26. | (<i>o</i>) Sect. 28. |
| (<i>t</i>) Sect. 4. | (<i>d</i>) <i>Id.</i> Unlike the former, however, |
| (<i>u</i>) 51 & 52 Vict. c. 51. | it does not except all leases at rack-rent. |
| (<i>x</i>) Sect. 5. | (<i>e</i>) Sect. 8. |
| (<i>y</i>) Sect. 6. | (<i>f</i>) <i>Hodson v. Sharpe</i> , 10 East, 330. |
| (<i>z</i>) Sect. 14. | (<i>g</i>) In other places the practice not |
| (<i>a</i>) Defined in s. 3; see <i>Rodger v. Harrison</i> , [1898] 1 Q. B. 161, cited <i>post</i> , p. 414. | infrequently obtains for the parties to share the expenses of the lease equally. |
| (<i>b</i>) <i>Battison v. Hobson</i> , [1896] 2 Ch. | (<i>h</i>) <i>Grisell v. Robinson</i> , 3 Bing. N. C. 10. |

solicitor by the former. He cannot, however (it has been said), recover from him surveyor's charges and counsel's fees as part of the costs of the lease (*i*), nor can he recover the fees of an engineer or surveyor consulted by him before granting a mining lease (*k*). And where there is more than one lessor, and they are represented by different solicitors, the lessee, in the absence of agreement (express or implied) to the contrary, pays one set of costs only (*l*).

As between lessor and his solicitor.—The lessor is primarily liable to his solicitor for the preparation of the lease, whether the lessee eventually takes up the lease or not (*m*).

As between lessor's solicitor and lessee.—The lessee, though liable to the lessor, is not directly liable to the lessor's solicitor; but slight evidence of a retainer of the latter by him—such as giving the solicitor instructions as to the lease (*n*), or agreeing with the lessor in the solicitor's presence that the lease shall be prepared by the solicitor (*o*)—will be sufficient to raise that liability as an inference of fact; and if it be once raised, the fact that the lease from a defect in the lessor's title has remained unexecuted will make no difference (*p*). The counterpart of a lease, however, is for the security of the landlord; hence even where an agreement stipulated that the latter would grant a lease at the request and at the cost of the tenant, it was held that the landlord's solicitors could not recover the costs of the counterpart from the tenant (*q*). Under special circumstances the tenant may obtain taxation of the charges of the landlord's solicitors even after he has paid them (*r*). A third party order to tax does not alter the nature or enlarge the scope of the liability upon the existence of which the order is based (*s*).

(*B*) *Amount*.—The amount of charges which a solicitor "having the conduct of the business" can make in respect of leases and agreements is now regulated by a General Order (1882), made under the Solicitors' Remuneration Act, 1881 (*t*). Under this Order a distinction is drawn between leases or agreements for

(*i*) *Lock v. Furze*, 19 C. B. N. S. 96; affd., L. R. 1 C. P. 441. In the next-cited case, however, this statement of the law is questioned so far as counsel's fees are concerned, on the ground that the lessee must be deemed to have contracted to indemnify the lessor against all expenses properly incurred in preparing the lease.

(*k*) *In re Gray*, [1901] 1 Ch. 239; *In re Fletcher & Dyson*, [1908] 2 Ch. 688.

(*l*) *In re Fletcher & Dyson*, *supra*.

(*m*) *Baker v. Meryceather*, 2 C. & K. 737.

(*n*) *Smith v. Clegg*, 27 L. J. Ex. 300.

(*o*) *Webb v. Rhodes*, 3 Bing. N. C. 732.

(*p*) *Id.*; *Smith v. Clegg*, *supra*.

(*q*) *Jennings v. Major*, 8 C. & P. 61. Cp. *In re Negus*, [1895] 1 Ch. 73.

(*r*) *In re Newman*, L. R. 2 Ch. 707.

(*s*) *In re Gray*, *supra*.

(*t*) 44 & 45 Vict. c. 44.

leases at rack-rent (other than building leases or agreements) on the one hand, and building leases (*u*) or agreements reserving rent or other long leases or agreements not at rent-rack (*x*) on the other (*y*). With regard to the former class of instruments the lessor's solicitor is to be entitled, "for preparing, settling, and completing lease and counterpart" (*z*), to make an *ad valorem* charge on the rent to the extent specified in the Order (*a*), and the lessee's solicitor, "for perusing draft and completing," one-half of that charge. With regard to the latter class, the lessor's solicitor is also entitled to make an *ad valorem* charge, specified in the Order (*a*), on the amount of annual rent (where a varying rent is payable, the largest amount thereof), and the lessee's solicitor is, as before, entitled to one-half of that charge. The scales, which differ essentially, only apply when the transactions have been completed (*b*); and only where the whole of the work there mentioned has been substantially done (*c*).

As to both classes of instruments, the following rules apply (*d*):—Where a solicitor is concerned for both lessor and lessee, he is to charge the lessor's solicitor's charges and one-half of those of the lessee's solicitor. Where a mortgagee or mortgagor joins in the lease, the lessor's solicitor may charge 1*l.* 1*s.* extra. Where the lease is partly in consideration of a money payment or premium and partly of a rent, then, in addition to the remuneration above specified in respect of the rent (*e*), there shall be paid a further sum equal to the remuneration on a purchase (*f*) at a price equal to such money payment or premium (*g*). This last rule, however, does not apply to a transaction which, though carried out by way of lease, is in fact a sale: as in the case—an expedient often resorted to by conveyancers—where a sale of property held with other property under one lease is carried out by an underlease, merely in order to avoid difficulties as to

(*u*) As to what is a building lease, see *In re Hogan's Estate*, [1894] 1 I. R. 503; *Hall to Sutton*, [1900] 1 I. R. 137.

(*z*) See *Ex parte Connolly*, [1900] 1 I. R. 1.

(*y*) The charges on mining leases are regulated by the former system with the alterations specified in Sched. II.: rule 2 (*c*). See *In re Gray*, *supra*.

(*z*) As against the tenant, however, the costs of the counterpart must be deducted: *In re Negus*, *supra*.

(*a*) Sched. I., Part 2.

(*b*) Rule 2 (*b*).

(*c*) *Wellby v. Still*, [1895] 1 Ch. 524, where a common form of lease (under a building scheme), for the preparation of which full charges had been allowed, having once been settled, only blanks remained to be filled up in each case.

(*d*) See Part 2 of Sched. I.

(*e*) See the last paragraph.

(*f*) See Part 1 of Sched. I. The word "purchase" is employed by mistake for "sale": per Chitty, J., *In re Horn*, [1896] 2 Ch. 797.

(*g*) See *In re Hellard*, [1896] 2 Ch. 229; *Ex parte Connolly*, *supra*.

apportionment of the rent with the superior landlord (*h*). Nor does it apply where, in a lease to a company, the consideration additional to the rent is the issue to the lessor of a certain number of its shares, some of which have not been allotted to him (*i*). But it applies even though no abstract of the lessor's title has been furnished to the lessee (*k*). Where such an abstract of title is furnished, it is to be charged for according to the former system (*l*), subject to certain alterations (*m*). And where a party other than the lessor joins in the lease, and is represented by a separate solicitor, the latter's charges are also to be dealt with under the old system, subject to the same alterations (*m*). It is further provided that fractions of 5*l.* are to be reckoned as 5*l.*; but though this rule applies in all cases falling within the second scale, it only applies in the first to rents not exceeding 100*l.*, and does not entitle the lessor's solicitor, where the rent exceeds that amount—the expression “per cent.” in this case being omitted—to charge any percentage on fractional amounts of 100*l.* (*n*).

Moreover, in all cases to which the above scales may apply, the solicitor may, before undertaking any business, by writing under his hand communicated to the client (*o*), elect that his remuneration shall be according to the former system, subject to such alterations (*p*); but if no such election be made, his remuneration is to be according to the scales above mentioned (*q*), nor does the fact that the solicitor has delivered an item bill under Schedule II., in respect of business to which Schedule I. (Part 2) applies, entitle the client to insist on taxation under Schedule II. (*r*). The election must be made before any part of the business covered by the retainer is done (*s*). And a solicitor must be paid either according to the scale or independently of the scale, and cannot in respect of the same piece of business be entitled to receive a remuneration made up partly according to one system and partly according to the other (*t*).

The amount fixed by the scales includes charges for negotiations for a lease where such negotiations end in a completed transaction (*u*)—an observation which also applies to the case already

(*h*) *In re Webb*, [1897] 1 Ch. 144
(reported as *Still v. Webb*, 45 W. R. 170).

(*i*) *In re Hasties*, 36 W. R. 572.

(*k*) *In re Robson*, 45 Ch. D. 71.

(*l*) Rules in Part 2 of Sched. I.

(*m*) Specified in Sched. II.

(*n*) *In re McGarel*, [1897] 1 Ch. 400.

(*o*) See this word defined in 44 & 45
Vict. c. 44, s. 1.

(*p*) Specified in Sched. II.

(*q*) Rule 6.

(*r*) *In re Negus*, [1895] 1 Ch. 73.

(*s*) *In re Allen*, 34 Ch. Div. 433.

(*t*) *In re Robson*, *supra*; *In re Hickley*,
54 L. J. Ch. 608.

(*u*) *In re Field*, 29 Ch. Div. 608.

referred to (*x*) where the consideration consists of a premium as well as rent (*y*),—though it does not cover negotiations as to the letting of property carried on by a solicitor with persons other than the person to whom the lease is ultimately granted (*z*). Thus, it includes charges for the preparation of a prior agreement for a lease (as well as for the negotiations preliminary to such agreement (*a*)) where the agreement is only a step towards the granting of the lease, and does not contain stipulations relating to entirely distinct matters (*b*). The “agreements for leases” mentioned in the scales are those agreements which regulate tenancies where no actual lease is executed (*c*): for example, the ordinary agreement (if in writing) for a three years’ tenancy (*d*), though no writing be required by law for the creation of such tenancy at all (*e*).

But although the scale fee includes everything connected with the lease, it does not include expenses of ascertaining the proper party to whom the lease is to be granted; hence where a lease contained a covenant for renewal at the request and costs of the lessee, his executors or assigns (*f*), and after his death renewal was applied for by his executors, who delivered certain documents as an abstract of their title, it was held that the cost of investigating that title was not included in the scale charge (*g*).

The remuneration fixed by the scales does not include stamps, counsel’s fees, auctioneer’s or valuer’s charges, travelling or hotel expenses, &c., where such disbursements are reasonably and properly paid, nor any extra work occasioned by changes occurring in the course of any business, nor any business of a contentious character, nor any proceedings in any court; but it includes law stationer’s charges, &c., and allowances for time of the solicitor and his clerks (*h*).

Attestation.—In the case of leases made under a power attestation is now regulated by statute (*i*). In other leases attestation is not required by law, but is usually resorted to in order to prove the lease with readiness at any subsequent time if it should become necessary to do so (*k*).

(*x*) *Supra*, p. 335.

(*y*) *In re Horn*, [1896] 2 Ch. 797.

(*z*) *In re Martin*, 41 Ch. Div. 381.

(*a*) *Savery v. Enfield Local Board*, [1893] A. C. 218.

(*b*) *In re Emanuel*, 33 Ch. Div. 40; *Savery v. Enfield Local Board*, *supra*.

(*c*) *In re Emanuel*, *supra*.

(*d*) *In re Negus*, *supra*.

(*e*) *Ante*, p. 10.

(*f*) See *ante*, p. 306.

(*g*) *In re Baylis*, [1907] 2 Ch. 51.

(*h*) Rule 4.

(*i*) 22 & 23 Vict. c. 35, s. 12.

(*k*) See Roscoe, N. P. 133 *et seq.* (17th ed.).

The landlord is not entitled to insist on the execution of the counterpart of the lease by the lessee being attested by himself or by his own agent (*l*).

Alterations and indorsements.—A lease, like any other deed or instrument, is avoided if *after* its execution it be altered in any material particular (*m*); but whether so avoided or not it will still be admissible in evidence for the purpose of showing the terms of the tenancy (*n*), the explanation of an alteration required from the party tendering an instrument in evidence being confined to those occasions when he is seeking to enforce it or claiming an interest under it (*o*). And as a lease cannot be altered after its execution without fraud or wrong, the presumption, if an alteration appears, is that it was made before execution (*p*). So an alteration made before the execution of a lease by lessor or lessee, but after its execution by other parties not beneficially interested who have joined in it, will not render it invalid (*q*). Where an instrument of demise appeared on the face of it to have originally contained words creating a tenancy from year to year, which were struck out and only the words "for the term of one whole year fully to be complete and ended" remained, it was held that the words struck out might be looked at to show what the intention was, that the tenancy was one for a single year only (*r*), and that the subsequent stipulations, most of which were wholly inapplicable to a tenancy for a single year, must be considered as expunged or as only applicable in case the tenancy should continue beyond the year (*s*). It is, however, now definitely established that where words have been deleted from a contract before its final conclusion, the true principle is that they cannot be looked at for any purpose whatever connected with the construction of the contract (*t*).

A memorandum indorsed on a lease after its execution is a new instrument, and must be stamped as such (*u*); but even though stamped as a lease, it will not operate as such if this result appear to be contrary to the intention of the parties (*x*). A memorandum of agreement without consideration indorsed on a lease by a person

(*l*) *Borradale v. Smart*, 5 W. R. 270.

(*m*) See notes to *Master v. Miller*, 1 Sm. L. C. 767 (11th ed.), where the cases are collected.

(*n*) *Hutchins v. Scott*, 2 M. & W. 809.

(*o*) See *Falmouth (Lord) v. Roberts*, 9 M. & W. 469; 2 Taylor on Evidence, 1310 (10th ed.).

(*p*) *Doe v. Catmore*, 16 Q. B. 745.

(*q*) *Hall v. Chandless*, 4 Bing. 123.

(*r*) Cf. *ante*, p. 110.

(*s*) *Strickland v. Maxwell*, 2 Cr. & M. 539.

(*t*) See *Inglis v. Buttery*, 3 App. Ca. 552, at p. 569, per Lord Hatherley.

(*u*) *Supra*, p. 329.

(*x*) *Goodright v. Mark*, 4 M. & S. 30.

not a party to it, but interested as remainderman, is not binding upon him (*y*).

An indorsement, on the other hand, made upon a lease *before* its execution is part of the instrument (*z*). Where a memorandum signed only by the lessee and conferring certain rights upon him was indorsed upon a lease subsequently executed by both him and the lessor, it was held, that as the agreement expressed in the memorandum formed an essential part of the consideration for taking the lease, it was binding on the lessor though not signed by him (*a*).

Rectification and rescission.—Where, owing to mistake, a lease is found when executed not to be according to the real intention of the parties, relief will sometimes be given on application to the Court (*b*), which should be made by an action brought in the Chancery Division (*c*). Such mistake, however, must be clearly established by evidence, the burden of proof being, of course, on the party setting it up (*d*); nor will parol evidence be admitted to show that the lease, though in strict accordance with the written agreement on which it has been founded, does not carry out the real intention of the parties by reason of its omission, on the one hand, of something not contained in the agreement (*e*), or of its inclusion of something contained in it, on the other (*f*). It has, however, been pointed out that to grant relief where error has crept into one document, and refuse it where it is embodied in two, appears to be inconsistent with equitable principle (*g*).

The application for relief may of course be defeated by delay; but time runs, not from the date of the conveyance, but from the date when the party first became aware of the mistake which had been made (*h*).

The mistake to which the remedy of rectification is applicable is mistake common to both parties; where the mistake has only been unilateral the Court cannot, in the absence of fraud, or misrepresentation amounting to fraud, rectify after conveyance; though of course the Court can, in a sufficient case before completion,

(*y*) *Dowling v. Mill*, 1 Madd. 541.

(*z*) *Flint v. Brandon*, 1 N. R. 73;
Weak v. Escott, 9 Price, 595.

(*a*) *Frogley v. Lovelace (Lord)*, Johns.
333.

(*b*) *Murray v. Parker*, 19 Beav. 305;

Cowen v. Truefitt, [1899] 2 Ch. 309.

(*c*) Jud. Act, 1873, s. 34.

(*d*) *Seaton v. Staniland*, 4 Giff. 61.

(*e*) *Davies v. Fitton*, 2 Dru. & War.
225.

(*f*) *May v. Platt*, [1900] 1 Ch. 616.
This (as well as the two next-cited decisions) was a case of sale, but the same principle would apply.

(*g*) *Thompson v. Hickman*, [1907] 1
Ch. 550.

(*h*) *Beale v. Kyte*, [1907] 1 Ch. 564.

declare that there has been no contract, on the ground that the parties have never been at one (*i*). The mistake of one party to a contract can consequently never be a ground for compulsory rectification so as to impose on the other party the erroneous conception of the first (*k*). In such case the proper remedy is rescission (*l*);—a remedy, it may be added, which is also capable of application to cases where the mistake is mutual (*m*). This, of course, does not mean that a party who has accepted, in good faith and in its natural sense, a proposal made in explicit terms can be deprived of his right to rely on the contract merely because the proposer failed to express his own intention; for in such case the proposer is estopped from showing that his reasonably apparent meaning was not his real meaning (*n*). Where, however, the acceptor could not have reasonably supposed that the offer as accepted by him expressed the real intention of the offeror—so that there has been “unfair dealing” on his part (*o*)—the Court, whilst declining to hold the offeror bound, and whilst unwilling to require the acceptor to accept the real offer which was never effectually communicated to him, and which he would not perhaps have agreed to, endeavours to put the parties in the same position as if the original offer were still open (*n*). This is done by conferring on the acceptor the option, in lieu of having the transaction rescinded, of taking what the offeror meant to give (*p*). This principle has been applied to the case of a lease the parcels of which, through mistake on the part of the lessor, included more than he really intended to convey (*q*). So, where it appeared that the rent reserved by a lease was, owing to a mistake on the part of the lessor, considerably less than was in accordance with the real intention of the parties, it was held that he was not entitled as a matter of right to have the lease rectified, but that the lessee could exercise the option of accepting or rejecting such rectified lease, paying in the latter case at the higher rate for the occupation he had enjoyed and receiving an allowance for any repairs or improvements executed by him on the premises (*r*). When the relief sought is rescission it seems that parol evidence is admissible,

(*i*) 2 Dart, V. & P. 743 (7th ed.).

(*k*) Fry on Sp. Perf. p. 345 (4th ed.).

(*l*) *Mortimer v. Shortall*, 2 Dru. & War. 363; *Sutherland (Duke of) v. Heathcote*, [1892] 1 Ch. 475.

(*m*) *Cooper v. Phibbs*, L. R. 2 H. L. 149. See p. 342, *infra*.

(*n*) Pollock, Contracts, p. 477 (7th ed.).

(*o*) *Moy v. Platt*, *supra*.

(*p*) *Harris v. Pepperell*, L. R. 5 Eq. 1; *Bloomer v. Spittle*, L. R. 13 Eq. 427. See this last case commented on in *Beale v. Kyle*, *supra*.

(*q*) *Paget v. Marshall*, 28 Ch. D. 255.

(*r*) *Garrard v. Frankel*, 30 Beav. 445.

whether there was or was not a written agreement prior to the executed lease (*s*).

Rescission may also be resorted to by the lessee (*t*) as a remedy for fraud, misrepresentation, or concealment on the part of the lessor. Thus, where a lessor knew that he had no title to grant certain lands included in a demise, it was held that the lessee, who neither knew nor had the means of knowing of such want of title, might at his option either avoid the lease altogether or accept it for the remaining lands with damages for the loss he had sustained (*u*). A misrepresentation, however, merely of law is insufficient (*x*); whilst, as regards misrepresentations of fact not amounting to fraud, it would appear necessary to distinguish, so far as the right of setting aside the transaction is concerned, between cases where the lease has, and those where it has not, been executed. There seems to be no doubt that, in accordance with general principle, a material misrepresentation, however innocent, will suffice to avoid an agreement for a lease like any other contract (*y*). When, however, the lease has been actually executed, the limits of the right of rescission appear not to be very clearly settled. There is a direct *dictum* in one case (*z*) to the effect that an actual lease entered into on the faith of an innocent misrepresentation will, on application made by the lessee with proper promptitude, be rescinded; whilst in another (*a*) the right to rescission in such event seems to have been throughout assumed. And there is no doubt that executed contracts have been rescinded on the ground of their having been induced by false statements which were believed to be true by the persons making them (*b*). It is, however, submitted that where the lease has been executed the true doctrine is that rescission is only available as a remedy when there has been what in legal contemplation amounts to fraud (*c*). Whether mutual mistake is a

(*s*) *Gun v. McCarthy*, 13 L. R. (1.) 304.

(*t*) As to similar relief to the lessor, see *ante*, p. 21.

(*u*) *Mostyn v. West Mostyn Coal Co.*, 1 C. P. D. 145, where it seems to have been thought that the relief could only be given if possession had not been taken by the lessee. But it is submitted that the mere taking of possession will not preclude rescission if the situation of the parties has in no substantial way been altered. See *Leake on Contracts*, pp. 259, 260 (5th ed.), and *Sutherland (Duke of) v. Henthcote*, *supra*.

(*x*) *Legge v. Croker*, 1 Ball & B. 506; *Fry on Sp. Perf.* p. 300 (4th ed.).

(*y*) See *Derry v. Peek*, 14 App. C.a. at p. 359, per Lord Herschell; *Wauton v. Coppard*, [1899] 1 Ch. 92.

(*z*) *Kennard v. Ashman*, 10 T. L. R. 213, 447, per Wills, J., at p. 214.

(*a*) *Whittington v. Seale-Hayne*, 82 L. T. 49.

(*b*) *Fry*, p. 290.

(*c*) See 2 *Dart, V. & P.* 808 (7th ed.) (where the cases on sales are given); *Seddon v. N. E. Salt Co.*, [1905] 1 Ch. 326. As to what is fraud, see *Derry v. Peek*, *supra*.

ground for rescission (*d*) after execution, in the absence of a total failure of consideration, appears open to doubt (*e*).

In an action by lessees for rescission of a lease on the ground of misrepresentation (not amounting to fraud) as to the state of drainage of the premises, it has been held that they were not entitled to an indemnity from all the consequences of entering into the contract, and that the lessor, though liable for any sums (*e.g.*, for rent or repairs) paid by the lessees under it, was not liable for any damage (as for expense incurred by the lessees in erecting buildings for the purposes of their business) arising in respect of obligations not directly created by the contract (*f*).

(*d*) *Supra*, p. 340.

(*e*) See *Debenham v. Sawbridge*, [1901] 2 Ch. 98, at p. 109.

(*f*) *Whittington v. Seale-Hayne, supra*. The right to rescission, as just stated, was apparently conceded.

CHAPTER II.

ENTRY UNDER AGREEMENT FOR A LEASE.

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Tenancy at will, and from year to year.

ENTRY under an executory agreement for a lease, whether such agreement be valid under the Statute of Frauds or not, like entry under a void lease (a), of itself only creates a tenancy at will (b). By payment of rent, however, this tenancy (unlike an express tenancy at will (c)) is at once displaced; for such payment is deemed to furnish evidence that the parties intended to convert it into a yearly tenancy (d). But evidence to the contrary may always be given to rebut this presumption; and the question of

(a) *Ante*, p. 11.

(b) *Coatworth v. Johnson*, 55 L. J. Q. B. 220.

(c) *Doe v. Cox*, 11 Q. B. 122; *ante*, p. 2.

(d) *Finlay v. Bristol and Exeter Ry. Co.*, 7 Exch. at p. 415, per Martin, B.

the real character of the tenancy then becomes one of fact to be decided upon all the circumstances of the case (*e*). The payment, however, for the above presumption to arise must have been made with reference to a yearly holding (*f*); but actual payment is not necessary, for any act legally equivalent to it, *e.g.*, acknowledgment in account (*g*), or even a promise, after a rent certain has accrued due, to pay it (*h*), will be sufficient for this purpose.

The yearly tenancy thus implied from the payment and acceptance of rent is subject while the term agreed upon is running to all the stipulations contained in the agreement which are not inapplicable to a yearly holding (*i*): and it makes no difference that such payment is made, not as between the original parties to the agreement, but by (*j*) or to (*k*) a successor in interest.

Stipulations, for instance, as to the rotation of crops (*l*), or for the cultivation of lands on any system that may be agreed upon (*m*): covenants to pay rent in advance (*n*): not to underlet the premises (*o*): to keep them throughout the term in tenantable repair (*p*): an undertaking to keep open the premises as a shop and promote its trade (*q*): a stipulation that rent shall abate in case of damage to the premises by fire (*r*), or that the tenancy may be determined "at any time hereafter" on giving six months' notice (*s*),—are, as it has been held, all applicable; but not a covenant to build (*t*), or (probably) to make substantial repairs (*u*), nor a stipulation for two years' notice to quit (*x*). And if the instrument of demise contain a proviso of re-entry (*y*) upon breach of covenant, such proviso will also be applicable (*z*).

At the end, moreover, of the term agreed upon the lessee, having had the enjoyment of the premises, will be bound by any contract

(*e*) See *Roe v. Prideaux*, 10 East, 158 (case of a void lease, but the same principle applies).

(*f*) *Braythwaite v. Hitchcock*, 10 M. & W. 494, per Parke, B.

(*g*) *Cox v. Bent*, 5 Bing. 185.

(*h*) *Regnart v. Porter*, 7 Bing. 451, per Tindal, C. J.

(*i*) As to notice to quit in these cases, see p. 607, *post*.

(*j*) See *Buckworth v. Simpson*, 1 C. M. & R. 834. See also *post*, pp. 421, 431.

(*k*) *Arden v. Sullivan*, 14 Q. B. 832; *Wyatt v. Cole*, 36 L. T. 613.

(*l*) *Doe v. Amey*, 12 A. & E. 476.

(*m*) *Tooker v. Smith*, 1 H. & N. 732, per Martin, B. See now as to such stipulations, 6 Edw. 7, c. 56, s. 3 (1); *ante*, p. 294.

(*n*) *Lee v. Smith*, 9 Exch. 662.

(*o*) *Crawley v. Price*, L. R. 10 Q. B. 302.

(*p*) *Richardson v. Gifford*, 1 A. & E. 52.

(*q*) *Sanders v. Karnell*, 1 F. & F. 356.

(*r*) *Bennett v. Ireland*, E. B. & E. 326.

(*s*) *Bridges v. Potts*, 17 C. B. N. S. 314.

(*t*) *Richardson v. Gifford*, *supra*, per Parke, J.

(*u*) *Doe v. Amey*, *supra*, per Lord Denman, C. J.; *Bowes v. Croll*, 6 E. & B. 255, per Erle, J. Cf. *ante*, p. 150. The question is not now one of importance: see *infra*, at note (*h*).

(*x*) *Tooker v. Smith*, *supra*. See *post*, p. 605.

(*y*) As to this, see *ante*, p. 316.

(*z*) *Doe v. Amey*, 12 A. & E. 476; *Crawley v. Price*, L. R. 10 Q. B. 302.

he may have entered into to do something on the property at that time (*a*); and this even if the grant of the lease agreed for is subject to a condition (*e.g.*, the consent of a superior landlord) which has remained unfulfilled (*b*). Thus, an undertaking by the tenant to leave the premises in repair (*c*), or to paint the last year of the term (*d*), or to leave a certain stock of game on the premises (*e*), may be enforced against him. And, on the other hand, the lessor will, in the same way, be bound by a stipulation to pay for tenant-right at the end of the term (*f*).

Tenancy under the agreement.

The foregoing principles, however, as already explained (*g*), only apply at the present day in those cases where specific performance of the agreement is not to be obtained; for, where that relief can be had, the tenant holds under the agreement (*h*) in the same way (*i*) as if the lease had been actually granted (*k*), and the implication of a yearly tenancy has consequently ceased. In every case, therefore, the important question to be considered is, whether specific performance will be obtainable or not.

SPECIFIC PERFORMANCE.

For this relief to be granted two conditions must always be fulfilled: (A.) The contract between the parties must be complete; (B.) It must (in the absence of acts of part performance (*l*)) satisfy the conditions of the Statute of Frauds. And even where these conditions are satisfied, the relief in question, which has always been regarded as discretionary (*m*), may be withheld on other grounds to be presently mentioned (*n*).

The relief is to be obtained by an action of specific performance, which should be brought in the Chancery Division (*o*). When the value of the property does not exceed 500*l.*, it is within the jurisdiction of the County Court (*p*).

(*a*) *Adams v. Clutterbuck*, 10 Q. B. D. 403, per Cave, J. Cf. *ante*, p. 19.

(*b*) *Pistor v. Cater*, 9 M. & W. 315.

(*c*) *Id.*; *Beale v. Sanders*, 3 Bing. N. C. 850 (case of a void lease, but the principle is the same); *Ponsford v. Abbott*, C. & E. 225, Lopes, J.

(*d*) *Martin v. Smith*, L. R. 9 Ex. 50.

(*e*) *Adams v. Clutterbuck*, *supra*.

(*f*) *Brockington v. Saunders*, 13 W. R. 46. As to tenant-right, see *post*, pp. 716 *et seq.*

(*g*) *Ante*, pp. 10—17.

(*h*) *Walsh v. Lonsdale*, 21 Ch. Div. 9; *ante*, p. 13.

(*i*) Subject; however, to the observations made *ante*, p. 17.

(*k*) See the observations of Farwell, J., in *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608, cited *ante*, p. 15.

(*l*) *Infra*, p. 360.

(*m*) Fry on Specific Performance, p. 17 (4th ed.).

(*n*) *Infra*, pp. 365 *et seq.*

(*o*) Jud. Act, 1873, s. 34.

(*p*) 51 & 52 Vict. c. 43, s. 67.

The proper parties to the action are the parties to the agreement (*q*), or their representatives in interest; a remainderman after the death of a tenant for life with a leasing power being regarded (in an action brought by the intending lessee) as the representative of the tenant for life within the above rule (*r*). And where a person who has agreed to take a lease dies, his executors admitting assets may be compelled to accept it, the covenants being so qualified that the executors shall be no further liable thereon than they would have been on the covenants which ought to have been entered into by their testator (*s*); and the same thing holds in the case of a covenant in a lease to take a renewed lease not beneficial to the executors (*t*). For, where specific performance is sought against persons having only a fiduciary interest, they are bound to covenant only so as to bind the property and not themselves personally (*u*).

Where the benefit of an agreement for a lease is assigned the remedy of specific performance is available to the assignee (*x*). And, on the other hand, when after an agreement for a lease has been entered into the reversion is assigned to a third person, the relief is available against him where he has purchased expressly subject to the agreement (*y*), or where he merely takes with notice of its existence (*z*). So the assignee of the reversion can obtain specific performance against the intending tenant (*a*).

It may be mentioned here that, in accordance with established rule, an agreement for a lease entered into with a person acting either on behalf of the promoters of a company, or on behalf of the company itself when incorporated, cannot, by adoption or ratification, enure for the benefit of the company, so as to entitle the latter to specific performance, where it purports to have been made on its behalf before the company came into existence; although a new agreement, if the circumstances necessarily imply it and are necessarily referable to it, with the company after its incorporation, may be inferred on the terms of the old one (*b*).

It is provided by statute that (in the absence of any stipulation

(*q*) Fry, pp. 68, 77.
 (*r*) *Shannon v. Bradstreet*, 1 Sch. & L.
 52.
 (*s*) *Phillips v. Ecerard*, 5 Sim. 102.
 (*t*) *Stephens v. Hotham*, 1 K. & J.
 571.
 (*u*) Fry, p. 414, citing *Page v. Broom*,
 3 Beav. 36.

(*x*) Fry, p. 93. See *infra*, p. 372.
 (*y*) *Kensington (Lord) v. Phillips*, 5
 Dow, 61.
 (*z*) Fry, p. 98.
 (*a*) *Manchester Brewery Co. v. Coombe*,
 [1901] 2 Ch. 608.
 (*b*) *Natal Land Co. v. Pauline Colliery*
Syndicate, [1904] A. C. 120.

to the contrary (c)) under a contract to grant a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee shall not be entitled to call for the title to the freehold (d): or, if derived out of a leasehold interest with a leasehold reversion, to call for the title to that reversion (e). Consequently, in an action for specific performance of an agreement to accept a lease, the defendant is not entitled to production of deeds which have been scheduled by the plaintiff as relating only to his title (f); and an agreement for a right of way during the lease stands for this purpose on the same footing as the agreement for a lease itself (g). He is not, however, precluded from showing *aliunde* that the title is bad (h), and if he raise a specific issue to that effect he will be entitled to an affidavit as to documents in the possession of the lessor which are relevant to that issue; but a mere vague general allegation, *e.g.*, that the property is subject to restrictive covenants, will not for that purpose be sufficient (i). The expression "leasehold reversion" in the statute last cited does not refer to a lease out of which an underlease is to be granted, but to the reversion, if leasehold and not freehold, expectant on the determination of that lease; so that upon an agreement for an underlease the title to the lease may always be called for (k).

An agreement to grant a lease by a corporation (like the lease itself (l)) must be under seal (m), and if not so made will not be enforced by specific performance (n). In conformity, too, with established rule, the relief will not be granted to or against an infant (o).

(A.) *There must be a complete contract.*

Where a material ingredient in the terms of an agreement for a lease is wanting—for instance, the time from which an increased rent is to commence—specific performance will not be decreed, as the contract is incomplete (p).

The principles relating to the formation of a complete and

(c) A stipulation binding the lessor to deliver an abstract of his title to grant the lease is such a stipulation: see *In re Pursell*, W. N. 1893, p. 152.

(d) 37 & 38 Vict. c. 78, s. 2.

(e) 44 & 45 Vict. c. 41, s. 13.

(f) *Jones v. Watts*, 43 Ch. Div. 574.

(g) *Id.*

(h) See *infra*, p. 368.

(i) *Jones v. Watts*, *supra*.

(k) *Goelling v. Woolf*, [1893] 1 Q. B. 89.

(l) *Ante*, p. 46.

(m) This, however, does not apply to companies incorporated under the Companies Acts: see 30 & 31 Vict. c. 131, s. 37.

(n) *Oxford (Mayor of) v. Crow*, [1893] 3 Ch. 535. Cf. *infra*, p. 364.

(o) Fry, p. 203; *Lumley v. Ravenscroft*, [1895] 1 Q. B. 683.

(p) *Ormond (Lord) v. Anderson*, 2 Ball & B. 363.

binding contract in agreements for leases are the same as in other agreements (*q*); and the negotiations, however lengthy or complicated, must in the last issue be capable of reduction to a proposal and an acceptance. Such acceptance, which may be implied from acts, provided those acts are unambiguous and unconditional (*r*), must, as in other cases, take place within a reasonable time (*s*), and before the proposal has been withdrawn (*t*), even if only withdrawn by implication, as by the death (*u*) or bankruptcy (*v*) of the proposer; for the latter may always withdraw at any time before acceptance (*x*), even though he may have given the other party a specified time for such acceptance (*y*). He may not, however, withdraw afterwards; and if the negotiations are by post it makes no difference that the withdrawal may have been actually posted before the acceptance if it only reaches the acceptor after it (*z*). Nor need formal notice of the withdrawal be given, if such other party have knowledge of some act having been done (*e.g.*, a contract made with a third person) inconsistent with the continuance of the proposal (*a*). Where a proposal is met by a counter-proposal, the latter operates as a rejection of the former, so that the original proposal cannot afterwards be closed with by tendering an acceptance of it (*b*). But where an intending lessee returned the draft agreement sent to him by the lessor with an intimation that he agreed to it subject to certain alterations he had made in it, and further alterations were afterwards made by the lessor which were rejected by him, it was held that subsequent acceptance by the lessor of the terms of the draft as returned by the lessee constituted a binding contract, as the offer made by the lessee in returning the draft remained open throughout the transaction (*c*).

Sometimes it is clear that the proposal and acceptance do not exactly relate to the same subject-matter, and then there is no

(*q*) See Pollock on Contracts, ch. 1. Many of the agreements the subject of decisions under this head relate to sales and not leases, but the same principle applies.

(*r*) *Warner v. Willington*, 3 Drew. 523.

(*s*) *Williams v. Williams*, 17 Beav. 213; *Meynell v. Surtees*, 25 L. J. Ch. 257.

(*t*) *Dickinson v. Dodds*, 2 Ch. Div. 463.

(*u*) Pollock on Contracts, p. 39 (7th ed.).

(*v*) *Meynell v. Surtees*, *supra*.

(*x*) *Warner v. Willington*, *supra*.

(*y*) *Routledge v. Grant*, 4 Bing. 633; *Bristol Bread Co. v. Maggs*, 44 Ch. D. 616.

(*z*) *Henthorn v. Fraser*, [1892] 2 Ch. 27, where, though the offer was made personally, the acceptor was held entitled to resort to the post by reason of the fact that, as the parties resided in different places, such a proceeding must have been within their contemplation.

(*a*) *Dickinson v. Dodds*, *supra*. See this case discussed in Pollock on Contracts, pp. 30—32.

(*b*) *Hyde v. Wrench*, 3 Beav. 334.

(*c*) *Jolliffe v. Blumberg*, 18 W. R. 734.

binding contract; *e.g.*, where the former relates to the purchase of a lease and the latter to the grant of a sub-lease (*d*), or where they relate to the giving of possession on different dates (*e*), or where the proposal provides that the terms of the lease should be reasonable in the estimation of the proposer, and the acceptance specifies that they will be of the usual character of such letting (*f*). Similarly, if the acceptance differs from the proposal in the addition to it of some material term, there is no complete contract (*g*); and no waiver of such term or condition can, of course, be effectual after repudiation of the negotiations by the other party (*h*). But if the added term have no material effect, *e.g.*, where it merely suggests a certain mode for carrying out the contract (*i*), or merely fixes a time for signing a formal contract (*k*), or merely expresses a hope to be able to give possession on a certain day (*l*), or merely asks as to the time from which the proposer wishes completion of the transaction to date (the law itself implying completion within a reasonable time (*m*)), or if it only sets forth that which has really been the basis of the negotiation throughout (*n*),—this will be otherwise. And if the acceptance, though ambiguous, be capable of being construed as an acceptance pure and simple of the proposal, the proposer will be justified in treating it in that sense and in acting upon it (*o*).

Sometimes, again, the acceptance is clearly not meant to be final, as where it is expressed to be “subject to the terms of a contract being arranged” (*p*), or where it provides that “terms are to be expressed in an agreement to be signed as soon as prepared” (*q*), or contains a request by an agent for the contract to be sent in order to get it signed by his principal (*r*), or where after intimating a decision to take certain premises it refers the proposer to an agent “to arrange matters” (*s*), or where it refers to certain covenants to be contained in the lease, and suggests that they

(*d*) *Holland v. Eyre*, 2 S. & S. 194.

(*e*) *Routledge v. Grant*, *supra*.

(*f*) *Wilcox v. Redhead*, 49 L. J. Ch. 539.

(*g*) *Crossley v. Maycock*, L. R. 18 Eq. 180; *Lucas v. James*, 7 Hare, 410; *Jones v. Daniel*, [1894] 2 Ch. 832.

(*h*) *Moritz v. Knowles*, W. N. 1899, p. 83.

(*i*) *Gibbins v. North Eastern, &c., District*, 11 Beav. 1.

(*k*) *Bransom v. Stannard*, 41 L. T. 434.

(*l*) *Clive v. Beaumont*, 1 De G. & S. 397.

(*m*) *Simpson v. Hughes*, 66 L. J. Ch. 334.

(*n*) *Wood v. Aylward*, 58 L. T. 662.

(*o*) See *English, &c., Credit Co. v. Arduin*, L. R. 5 H. L. 64.

(*p*) *Honeyman v. Marryat*, 21 Beav. 14; 6 H. L. C. 112.

(*q*) *Wood v. Midgley*, 5 D. M. & G. 41.

(*r*) *Goodall v. Harding*, 52 L. T. 126.

(*s*) *Stanley v. Dowdeswell*, L. R. 10 C. P. 102.

should be similar to those of another lease (*t*), or where it is in effect a counter-proposal with a condition (beyond those of the proposal) which is never accepted (*u*). The mere fact, however, that one of the parties has throughout put an erroneous construction on a written contract existing between them, and insisted that it included what it does not in fact include, is no ground, on his application for specific performance of the remainder, for saying that there is no contract (*x*).

The question whether an acceptance or agreement is final or not usually presents itself in the case where, at the same time as it is given or entered into, an expression occurs of an intention that a formal contract or document shall be executed; and cases of this sort give rise to considerable difficulty. Inasmuch as in agreements for a lease this means that more shall be put into the lease than the law itself allows—*i.e.*, more than what are termed "usual" covenants (*y*),—the general rule may be stated to be that in these cases there is no complete contract (*z*). This is undoubtedly so if the acceptance or agreement is expressed to be *subject* to a formal contract (*a*),—and this even though a deposit have been asked for and actually paid by the lessee or purchaser (*b*),—and as such a condition enures for the benefit of both parties, one of them cannot waive it and ask for specific performance against the other (*c*). Similarly, an offer "subject to agreement stating fully the conditions being prepared and signed," although followed by an absolute acceptance, does not produce an enforceable contract (*d*).

But an acceptance "subject to contract as agreed" may be absolute, if it clearly refers to a form of contract definitive in all its terms and clearly identified by the offer, though such form remain unsigned (*e*). And if the condition be not so expressly stated, it is a question of construction whether the parties intended that the terms already agreed on should merely be put into form, or that they should be subject to a new agreement the terms of which have not been expressed in detail (*f*). Thus, where an

(*t*) *Cartwright v. Miller*, 36 L. T. 398.

(*u*) *Forster v. Rowland*, 7 H. & N. 108. Cp. *May v. Thomson*, 20 Ch. Div. 705.

(*x*) *Preston v. Luck*, 27 Ch. Div. 497.

(*y*) *Infra*, p. 383.

(*z*) *Winn v. Bull*, 7 Ch. D. 29, per Jessel, M. R.

(*a*) *Id.*; *Harvey v. Barnard's Inn*, 50 L. J. Ch. 750; *Hawkenworth v. Chaffey*, 55 L. J. Ch. 335.

(*b*) *Cook v. Williams*, 13 T. L. R. 481; *affd.*, C. A., 14 T. L. R. 31.

(*c*) *Lloyd v. Nowell*, [1895] 2 Ch. 744.

(*d*) *Watson v. McAllum*, 87 L. T. 547.

(*e*) *Filby v. Hounsell*, [1896] 2 Ch. 737. Distinguish *Clark v. Robinson*, 51 W. R. 443, where such identification was wanting.

(*f*) *Winn v. Bull*, *ubi sup.*

acceptance stated that a draft contract would be sent in due course (*g*), or that one was being prepared, and would be forwarded for approval (*h*), it was held, upon a consideration of all the circumstances of the case, that no final agreement had been arrived at; and the same result will always follow where only part of the necessary terms appear from the documents which have passed between the parties, because a settlement of the others will be assumed to have been left over till the formal document is prepared (*i*). So where a document specified the main heads of an agreement, but contained a provision that the transaction was to be subject to the approval by one of the parties of "a detailed contract to be entered into" between them, it was held that there was no concluded agreement, the circumstances showing that such contract was to be entered into, not merely for the purpose of formally expressing that which had been already agreed upon, but to embody terms which had not yet been settled (*k*). Similarly, where the documents which have passed between agents of the two parties show that what was contemplated was not making a bargain by them, but settling the terms of a formal contract to be signed by the parties themselves, there will be no binding agreement till that contract is executed (*l*).

It has, however, often been decided that a mere reference to the preparation of a formal document does not prevent a contract otherwise binding from being complete (*m*), though the circumstance that the parties intended a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement (*n*). So the mere fact that an acceptance refers to instructions having been given to a solicitor to prepare the necessary documents will not prevent the agreement from being regarded as concluded (*o*); and an agreement to grant a lease has even been held not to be rendered incomplete by a clause providing that a proper lease should be drawn up with all proper clauses and approved of by

g) *Vale of Neath Co. v. Furness*, 45 L. J. Ch. 276.

h) *Chinnock v. Ely (Lady)*, 4 D. J. & S. 638. *Ball v. Bridges*, 30 L. T. 430, where the acceptance further referred expressly to certain necessary "details" to be embodied in the contract, is to the same effect.

i) *Donnison v. People's Café Co.*, 45 L. T. 187.

k) *Page v. Norfolk*, 70 L. T. 23, 781.

l) *Bushell v. Pocock*, 53 L. T. 860.

m) *E.g., Rossiter v. Miller*, 3 App. Ca. 1124; *Lewis v. Brass*, 3 Q. B. Div. 667; *Bonnewell v. Jenkins*, 8 Ch. Div. 70; *Oxford v. Provand*, L. R. 2 P. C. 135; *Cayley v. Walpole*, 39 L. J. Ch. 609; *Gray v. Smith*, 43 Ch. Div. 208; *Lucas v. Hall*, W. N. 1899, p. 92.

n) *Ridgway v. Wharton*, 6 H. L. C. 238, per Lord Cottenham, L. C.

o) *Bolton Partners v. Lambert*, 41 Ch. Div. 295. See note (*k*), p. 360, *infra*.

the intending grantor and his solicitor, when the grantor's only objection arose from his insisting on the insertion of a clause which the Court held not to be proper (*p*). And though an agreement, subject to approval of the title by the party's solicitor, has been held incomplete where such approval (in the absence of bad faith or unreasonableness) was not forthcoming (*q*), it seems questionable whether such a stipulation ought really to have that effect, as it may be doubted whether it intends more than that the title offered must be investigated and approved of in the usual way (*r*). So an offer to take a lease, though qualified by a provision that the lease was "to be approved in the customary way by my solicitor," may upon acceptance create a concluded contract, the meaning of the provision being merely that the solicitor was to see that nothing unusual or improper should be inserted in the formal lease which was to carry out the agreement (*s*).

When, as is often the case, the negotiations have spread over a number of letters interchanged between the parties or their agents, the whole of the correspondence must be taken into account in order to decide whether a final contract has been arrived at or not (*t*); and though, by stopping at a particular point, the last letter taken in conjunction with those that preceded it might support the inference that the contract was complete, yet that inference is not to be drawn if the subsequent letters show that negotiations were still going on (*u*), *e.g.*, where the party who alleges finality in this way is found to be himself stipulating at a later stage for a material additional term (*x*). (But this does not apply where, a complete contract having once been really concluded between the parties, such negotiations relate only to fresh matters subsequently started by either (*y*).) And the same result follows where, after an agreement is entered into which is insufficient to satisfy the Statute of Frauds, one of the parties is

(*p*) *Eadie v. Addison*, 52 L. J. Ch. 80.

(*q*) *Hudson v. Buck*, 7 Ch. D. 683.

(*r*) *Hussey v. Horne-Payne*, 4 App. Ca. 311, per Lord Cairns, L. C.

(*s*) *Chipperfield v. Carter*, 72 L. T. 487. *North v. Percival*, [1898] 2 Ch. 128 (case of a purchase) is to the same effect.

(*t*) *Williams v. Brisco*, 22 Ch. Div. 441.

(*u*) *Hussey v. Horne-Payne*, *supra*.

(*x*) *Bristol Bread Co. v. Maggs*, 44 Ch. D. 616.

(*y*) *Bellamy v. Debenham*, 45 Ch. D. 481, per North, J., where, however, specific performance was refused on the ground that the fresh matters, the introduction of which led to the defendant's breach of the contract, were started without justification by the plaintiff. (Affd., C. A., on another ground, [1891] 1 Ch. 412.) In *Mason v. Von Buch*, 15 T. L. R. 430, which was an action for damages, the principle in the text was followed,—it is thought (if the case is properly reported) incorrectly.

compelled, in order to eke out the insufficiency (z), to rely upon a subsequent letter written by the other which shows that the understanding between them is not complete (a).

Lastly, it must not be forgotten that the production of a signed agreement is not in itself conclusive of a binding contract, as parol evidence is admissible to show that—owing, for instance, to the non-performance of a condition precedent—there never really was an agreement between the parties (b). Hence where an agreement for a lease, signed by both parties, was handed by the lessor to his solicitor with instructions not to part with it unless the lessee obtained two responsible persons to join in the lease, it was held, in an action for specific performance by the lessee, that the true effect of the transaction was that the lessor declined to contract on the terms of the written document, but had made a counter-proposal which was not accepted by the lessee (c).

(B.) *The agreement must (in the absence of part performance (d)) satisfy the provisions of the Statute of Frauds.*

For the 4th section of that statute, which enacts that “no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized,” applies to an agreement to grant a lease (e).

The defendant must raise the defence of the statute specifically by his pleading in order to avail himself of its benefit (f). This is in accordance with the former practice (g).

The effect and application of the above enactment may be considered as follows:—

What contract (h).—Any agreement relating to the letting, for a term however short, of any premises—even of furnished

(x) See *infra*, p. 355.

(a) *Nesham v. Selby*, L. R. 7 Ch. 406.

(b) Stephen, Dig. Ev., Art. 90.

(c) *Patle v. Hornibrook*, [1897] 1 Ch. 25.

(d) *Infra*, p. 360.

(e) *Edge v. Stafford*, 1 C. & J. 391;

F.

Falmouth (Lord) v. Thomas, 1 Cr. & M. 89; *Sanderson v. Graves*, L. R. 10 Ex. 231. See *ante*, p. 74.

(f) R. S. C. 1883, O. 19, r. 15.

(g) *Skinner v. M'Douall*, 2 De G. & S. 265; *Beaton v. Nicholson*, 6 Jur. 620.

(h) See also *post*, p. 413.

apartments (*i*)—is within the statute (*k*), provided such agreement (in the latter case) relate to the giving of exclusive possession (*l*) of specified rooms, as distinguished from a mere agreement to furnish lodging (with board) generally in a house (*m*). The statute even extends to an agreement which, in addition to such letting, includes other matters within its scope, if such agreement be single and undivided in its nature (*n*). Thus a landlord cannot sue in respect of the breach by an intending tenant of any part of a verbal agreement to let a house, to make alterations and improvements for his benefit, and to sell to him the fixtures and furniture (*o*). So, on the other hand, a tenant who has entered under a verbal agreement for letting a house, by which the landlord has undertaken to send in more furniture, has been held to be unable to sue for a breach of the latter obligation (*p*). If, however, the landlord enters into such an undertaking in consideration of the tenancy commencing thereafter, it would seem that it will, in the event of the demise taking effect, be merely collateral to it (so far as an interest in land is concerned), and therefore not itself within the statute (*q*). So agreements as to sums to be paid periodically in addition to the rent, in respect of improvements made by the landlord (*r*), are not within the statute, whether such sums be called rent (*s*) or not (*t*). But a mere agreement for abatement of rent is within it (*u*). The statute, moreover, applies to an agreement for the grant of an incorporeal hereditament (not being a mere licence (*x*)), *e.g.*, a *profit à prendre*, like the right to sport or shoot over land and take away the whole or a certain part of the game that may be killed (*y*); but if no exclusive possession be given this will be otherwise (*z*).

(*i*) *Inman v. Stamp*, 1 Stark. 12; *Edge v. Strafford*, *supra*. See observation on these cases at p. 8, *ante*.

(*k*) *Cavaleiro v. Puget*, 4 F. & F. 537.

(*l*) See *ante*, p. 7.

(*m*) *Wright v. Stavert*, 2 E. & E. 721.

(*n*) *Harvey v. Grabham*, 5 A. & E. 61.

(*o*) *Vaughan v. Hancock*, 3 C. B. 766.

(*p*) *Meekelen v. Wallace*, 7 A. & E. 49.

(*q*) *Angell v. Duke*, L. R. 10 Q. B. 174. This case seems incorrectly reported. The demurrer (see the head-note, and see report in 82 L. T. 25) was to the second count of the declaration, which alleged a further verbal promise similar to, and in confirmation of, the earlier, after the tenancy had commenced; though nothing as to this appears from the judgments, as it clearly does in the L. T. report. How far such promise could in any event be

founded on valid consideration is not obvious; but when the case came to trial evidence of the earlier promise was rejected (see *infra*, p. 390), and the second promise, being plainly founded on no good fresh consideration, fell with it, and the plaintiff was nonsuited, the nonsuit being afterwards upheld by the Court. See 32 L. T. at p. 321.

(*r*) *E.g.*, as in *Beer v. Santer*, 10 C. B. N. S. 435.

(*s*) *Donellan v. Read*, 3 B. & Ad. 899.

(*t*) *Hoby v. Roebuck*, 7 Taunt. 157.

(*u*) *O'Connor v. Spaight*, 1 Sch. & L. at p. 306. Cp. *Fitzgerald v. Lord Port-arlington*, 1 Jones, 431.

(*x*) See *ante*, p. 7.

(*y*) *Webber v. Lee*, 9 Q. B. Div. 315.

(*z*) *Wells v. Kingston-upon-Hull*, L. R. 10 C. P. 402.

What memorandum.—The memorandum required by the statute must be in existence at the time any action upon it is brought (a), and it has been said that it must be a memorandum of an agreement complete at the time the memorandum is made (b). But it is not necessary that it should be a formal instrument of agreement; a mere receipt, for instance, given upon a deposit of money (c), or a letter written by the party to be charged, not to the other party, but to a third person, *e.g.*, his own agent (d), may suffice for this purpose. And so may a mere written proposal, if signed by the party to be charged, though only accepted by parol (e). Similarly, either of two alternatives contained in a signed proposal may, as against the offeror, be accepted, and a memorandum so made good within the statute (f). For the object of the statute being merely to exclude parol evidence, any writing embodying the terms of the agreement and signed by the person to be charged (g) is sufficient (h). And like the contract itself (i), such memorandum may be extracted from successive letters interchanged between the parties. Thus, if one document fails in itself to satisfy the statute, it may be eked out by another, even if in the latter the party to be charged, *while admitting the agreement* (k), refuses to complete the transaction (l); and for this purpose parol evidence, though not admissible with the mere object of showing that the two documents relate to the same subject-matter (m), may be given to connect them, either if the former document refer directly to the latter (n), or if their connection be a matter of reasonable inference (o).

If, for instance, there is a reference to something (*e.g.*, "instructions"), which may be a conversation, or may be a written

(a) See *Lucas v. Dixon*, 22 Q. B. Div. 357, per Lord Esher, M. R., and Bowen, L. J.

(b) *Munday v. Asprey*, 13 Ch. D. 855. It is, however, submitted that this must be taken as subject to what will be presently stated (*infra*, at note (e)) as to the sufficiency of an oral acceptance of a written offer made by the defendant, and that the case should have been differently decided by reference to that principle, as well as on the construction of the documents themselves.

(c) *Shardlow v. Cotterell*, 20 Ch. Div. 90.

(d) *Wood v. Aylward*, 58 L. T. 662.

(e) See *Reuss v. Pickley*, L. R. 1 Ex. 342.

(f) *Lever v. Koffler*, [1901] 1 Ch. 543. The head-note, however, in stating that

verbal acceptance would be sufficient, appears to go beyond the necessities of the case, for there was also an acceptance in writing.

(g) See p. 358, *infra*.

(h) Per Lindley, L. J., *In re Hoyle*, [1893] 1 Ch. 84.

(i) *Supra*, p. 353.

(k) *Jackson v. Oglander*, 2 H. & M. 465.

(l) *Warner v. Willington*, 3 Drew. 523; *Shippey v. Derrison*, 5 Esp. 190.

(m) *Clinan v. Cooke*, 1 Sch. & L. 22;

Potter v. Peters, 64 L. J. Ch. 357.

(n) *Dobell v. Hutchinson*, 3 A. & E. 355; *Morris v. Wilson*, 5 Jur. N. S. 168.

(o) *Wylson v. Dunn*, 34 Ch. D. 569; *Shardlow v. Cotterell*, *supra*; *Coombs v. Wilkes*, [1891] 3 Ch. 77. Cp. *Sheers v. Thimbleby*, 76 L. T. 709.

document, parol evidence may be given to show to which the reference is intended, and if it be a document, it may be put in evidence, and so connected with the former (*p*). So an envelope shown by parol evidence to have contained a letter may be used to supply the name of one of the parties not mentioned in that letter (*q*).

Similarly, in a written agreement to grant a lease of specified length "at the rent and terms agreed upon," parol evidence is admissible to show that the rent and all the terms except the length of the lease had been agreed upon in writing, and so connect the two writings together (*r*). For in construing a document it is always permitted to *identify* it by verbal evidence (*s*), *i.e.*, to inquire into the circumstances under which it was written in order to ascertain with reference to what and with what intent it must have been written (*t*); and if parol evidence for this purpose, when given, does connect the document in question with another, the two documents may be read together, with a view to satisfying the statute (*u*).

But though a sufficient memorandum may be obtained in the manner just indicated by putting together a number of different documents, it will not satisfy the statute unless all the material terms of the proposed lease are disclosed:—

(a) It must specify the parties—both lessor (*x*) and lessee (*y*); and for this purpose the signatures may be read as part of the memorandum (*y*). They need not, however, be named, for all that is wanted is something to identify the individual (*z*). Thus, a description (*e.g.*, "proprietor" (*a*), or "mortgagee" (*b*), or "trustee under trust for sale" (*c*), or "company in possession of the property and carrying on operations there" (*d*)) will be sufficient if it be a statement of a matter of fact as to which there can be perfect certainty (*e*); but not where it is such (*e.g.*, "lessor" or "vendor" merely (*f*)) as to require, in order to find out who

(*p*) *Ridgway v. Wharton*, 6 H. L. C. 238.

(*q*) *Pearce v. Gardner*, [1897] 1 Q. B. 688.

(*r*) *Baumann v. James*, L. R. 3 Ch. 508.

(*s*) *Long v. Millar*, 4 C. P. Div. 450, per Baggallay, L. J.

(*t*) Per Kekewich, J., in next-cited case.

(*u*) *Oliver v. Hunting*, 44 Ch. D. 205; *Studds v. Watson*, 28 Ch. D. 305.

(*x*) *Warner v. Willington*, 3 Drew. 523; *Williams v. Jordan*, 6 Ch. D. 517.

(*y*) *Stokell v. Niven*, 61 L. T. 18.

(*z*) *Cutling v. King*, 5 Ch. Div. 660 per James, L. J.

(*a*) *Rossiter v. Miller*, 3 App. Ca. 1124; *Sale v. Lambert*, L. R. 18 Eq. 1.

(*b*) *Jarrett v. Hunter*, 34 Ch. D. 182, per Kay, J.

(*c*) *Cutling v. King*, *supra*.

(*d*) *Commins v. Scott*, L. R. 20 Eq. 11. See per Jessel, M. R.

(*e*) *Rossiter v. Miller*, *supra*, per Lord Cairns, L. C.

(*f*) *Potter v. Duffield*, L. R. 18 Eq. 4; *Coombs v. Wilkes*, [1891] 3 Ch. 77.

answers to it, evidence on which there might possibly be a conflict (*g*). So, upon an agreement for the extension of a lease, a memorandum which made it plain that the lease was to be granted to the person who had paid a specified premium was held sufficient (*h*). But where the description is inadequate it does not make any difference that the one party knew who the other party was (*i*). It is sufficient that the written contract should show who the contracting parties are, although they or one of them may be acting on behalf of others; and it makes no difference whether the fact of agency can be gathered from the written document or not, for who the principals are may be proved by parol (*k*).

(b) It must describe the property to be included in the lease (*l*); but such description need not be specific (*m*), nor need it necessarily contain words of themselves showing that the parties had agreed upon a definite and particular property beforehand (*n*), as parol evidence on the question of parcel or no parcel is always admissible (*o*).

(c) It must state the time of commencement of the term (*p*); for though it was formerly thought that the term might, in the absence of such statement, be deemed to commence from the date of the agreement (*q*), it is settled that this does not apply to an executory agreement for a lease, which leaves something (the preparation of the lease, at all events) to be done before the term can begin (*r*). Nor will the presence of the words "immediate possession if required" make any difference in this respect (*s*).

But where the agreement states that rent is to be payable from a certain date, the term has been held to commence from that date (*t*); and where an agreement provided that on paying a

(*g*) *Jarrett v. Hunter*, *supra*, per Kay, J.; *Pattle v. Anstruther*, 69 L. T. 175.

(*h*) *Carr v. Lynch*, [1900] 1 Ch. 613.

(*i*) *Jarrett v. Hunter*, *supra*.

(*k*) *Filby v. Hounsell*, [1896] 2 Ch. 737; *Morris v. Wilson*, 5 Jur. N. S. 168.

(*l*) *Lancaster v. De Trafford*, 31 L. J. Ch. 554; *Oliver v. Hunting*, 44 Ch. D. 205.

(*m*) *Shardlow v. Cotterell*, 20 Ch. Div. 90, per Jessel, M. R. As to agreements where the property to be demised is subject to an "exception" not specified, see *ante*, p. 100.

(*n*) *Plant v. Bourne*, [1897] 2 Ch. 281.

(*o*) *Ante*, p. 79. See 1 Dart, V. & P. 238 (7th ed.), where the cases on sales will be found collected.

(*p*) *Blore v. Sutton*, 3 Mer. 237; *Clarke v. Fuller*, 16 C. B. N. S. 24; *Nesham v. Selby*, L. R. 7 Ch. 406; *Cartwright v. Miller*, 36 L. T. 398.

(*q*) *Jaques v. Millar*, 6 Ch. D. 153.

(*r*) *Marshall v. Berridge*, 19 Ch. Div. 233; *Oxford (Mayor of) v. Crow*, [1893] 3 Ch. 535; *Humphery v. Conybeare*, 80 L. T. 40; *ante*, p. 105.

(*s*) *Rock Portland Co. v. Wilson*, 52 L. J. Ch. 214.

(*t*) *Wesley v. Walker*, 38 L. T. 284.

specified sum the lessee was to get possession of the premises at a certain rent and also of a lease for twenty-one years, the term was held to commence from the time such payment was made (*u*). It is always sufficient, too, if the commencement of the term, though not stated expressly, can be collected from the agreement (or from subsequent correspondence (*x*)) with reasonable certainty (*y*); so that where, for instance, the agreement is to grant to a party in possession an "extension" of lease, he will be entitled to a lease to commence from the expiration of the existing term (*z*). Similarly, where the agreement states a time within which possession is to be given, evidence will be admitted to show the date of giving possession, and the agreement will be held to commence from that date (*a*).

(*d*) It must specify the length of the term (*b*); so that though an agreement of sale is assumed to refer to the whole interest possessed by the owner (*c*), where the document relied upon itself refers to the transaction as a lease its duration must be stated, or the document will be invalid (*d*). An agreement, however, for a lease "for seven, fourteen, or — years" has been held to entitle the tenant to a lease for fourteen years, determinable at his option at the end of seven years (*e*).

(*e*) It must specify the amount of rent to be paid (*f*).

What signature.—The signature required is that of the "party to be charged," and a document signed by him, though not by the other party, will accordingly satisfy the statute (*g*), and, notwithstanding the original want of mutuality, entitle the other party to a decree of specific performance (*h*); for by instituting proceedings he has waived such want, and rendered the remedy mutual (*i*). So

(*u*) *Erskine v. Armstrong*, 20 L. R. (I.) 296.

(*x*) *White v. Hay*, 72 L. T. 281.

(*y*) *Marshall v. Berridge*, *supra*, per Lush, L. J.; *Phelan v. Tedcastle*, 15 L. R. (I.) 169.

(*z*) *Verlander v. Codd*, T. & R. 352.

(*a*) *In re Lander*, [1892] 3 Ch. 41.

(*b*) *Clinan v. Cooke*, 1 Sch. & L. 22; *Gordon v. Trevelyan*, 1 Price, 64; *Cox v. Middleton*, 2 Drew. 209; *Clarke v. Fuller*, 16 C. B. N. S. 24; *Fitzmaurice v. Bayley*, 9 H. L. C. 78.

(*c*) *Bower v. Cooper*, 2 Hare, 403.

(*d*) *Dolling v. Evans*, 36 L. J. Ch. 474. As to anomalous instruments, such as that in *Kusel v. Watson*, 11 Ch. Div. 129, see that and similar cases discussed *ante*, p. 112.

(*e*) *Powell v. Smith*, L. R. 14 Eq. 85. See p. 111, *ante*.

(*f*) See *Dear v. Verity*, 21 L. T. 185, per Giffard, L. J.

(*g*) *Laythoarp v. Bryant*, 2 Bing. N. C. 735.

(*h*) *Boyd v. Ayerst*, 6 Madd. 316.

(*i*) *Fry*, p. 209.

long as the signature attests the document as that which contains the terms of the contract, it is immaterial that the memorandum was not made at the time, or for what purpose the signature has been appended (*k*).

As regards the mode of signature, all that is required is that the party who is sought to be charged shall by writing his own name have attested that he has entered into the contract (*l*); though, as it has been said, signing for the purposes of the statute does not necessarily mean writing one's name, but ratifying by writing in some form or other the document which contains the contract (*m*). Thus, a document headed "from A. B." (*n*), or commencing "A. B. agrees" (*o*), or "I, A. B., agree" (*p*), may without more be sufficient. So a document addressed in its heading to "Messrs. A. B., of C." in the handwriting of their authorized agent, submitted to the other party to the contract (and signed by him), contains a signature sufficient to charge A. B. (*q*). But where no part of the document has been written by the party sought to be charged or his agent, the mere fact that it contains his name (as where the writing is on a sheet of paper on which it is printed by way of heading), even though also addressed to him by name by the other party, is insufficient; unless perhaps where the document has been dictated by the former and handed over by him, as representing the contract, to be signed by the latter (*r*). The name may be written in pencil (*s*), or in print (*t*); it may be contained in a telegraph form serving as instructions for a message to the other party (*u*); and, apparently, the appending of initials will suffice (*x*).

Nor is the position of the signature in the memorandum important, provided it be inserted in such a manner as to authenticate every material part of the instrument (*y*); a document, for instance, merely headed "from A. B." (the party to be charged) will be sufficient, as already seen, if given under circumstances which show a recognition of the name as it stands for his own, without any

(*k*) See *Jones v. Victoria Graving Dock Co.*, 2 Q. B. D. 814.

(*l*) *Proper v. Parker*, 1 Russ. & M. 625.

(*m*) *Hucklesby v. Hook*, 82 L. T. 117, per Buckley, J.

(*n*) *Touret v. Cripps*, 48 L. J. Ch. 567.

(*o*) *Bleakley v. Smith*, 11 Sim. 150.

(*p*) *Knight v. Crookford*, 1 Esp. 190.

(*q*) See *Evans v. Hoare*, [1892] 1 Q. B. 593.

(*r*) *Hucklesby v. Hook*, *supra*.

(*s*) *Lucas v. James*, 7 Hare, 410.

(*t*) *Touret v. Cripps*, *supra*. See now 52 & 53 Vict. c. 63, s. 20.

(*u*) *Godwin v. Francis*, L. R. 5 Q. P. 295; *Coupland v. Arrowsmith*, 18 L. T. 755.

(*x*) Sugden, V. & P. 144 (14th ed.).

(*y*) *Ogilvie v. Foljambe*, 3 Mer. 53; followed in *Caton v. Caton*, L. R. 2 H. L. 127.

need to prove a custom on his part to sign in that manner (z). But where this is not the case, *e.g.*, where the signature of the party charged upon an agreement for a lease occurs only in the clause relating to the payment of rent (a), the statute will not be satisfied.

What person authorized.—The statute, as has been seen, allows the memorandum to be signed by a person lawfully authorized by the party to be charged; and though it has been said that in that case such memorandum must, in order to be valid, be one which the principal has authorized the agent to sign as a record of the transaction (b), it is now established that this is not necessary, and that a letter (for instance) written by an agent within the scope of his authority, and referring to and recognizing an unsigned document as setting out the terms of an agreement entered into by his principal, will satisfy the statute (c). The bare entry of a steward in the landlord's contract-book with his tenants, however, has been held not to be sufficient (d). And a solicitor employed merely to put a contract into shape is not a person "lawfully authorized" within the statute (e). The question whether the agent signing had authority or not is one of fact (f), and writing is not necessary to convey it (g). As in other cases of agency (h), such authority is determined by the death of the principal, even though the agreement is afterwards entered into by the agent in ignorance of that circumstance (i).

On the other hand, if the agent, purporting to act on behalf of his principal, enter into an agreement without authority, his act may be afterwards ratified by the principal: a ratification which, when duly made, will relate back to the agreement so as even to prevent a revocation by the other party during the interval from being effectual (k).

Part performance.—There is an important exception to the general rule, that specific performance of an agreement for a lease

(z) *Touret v. Cripps*, *supra*.

(a) *Stokes v. Moore*, 1 COX, 219.

(b) *Smith v. Webster*, 3 Ch. Div. 49, per Lush, J.

(c) *John Griffiths Cycle Corporation v. Humber*, [1899] 2 Q. B. 414.

(d) *Charlewood v. Duke of Bedford*, 1 Atk. 497.

(e) *Bowen v. Duc d'Orléans*, 16 T. L. R. 226.

(f) See *Ridgway v. Wharton*, 6 H. L. C. 238.

(g) *Clinan v. Cooke*, 1 Sch. & L. 22; *Heard v. Pilley*, L. R. 4 Ch. 548.

(h) See Pollock on Contracts, p. 97 (7th ed.).

(i) *Carr v. Levington*, 35 Beav. 41.

(k) *Bolton Partners v. Lambert*, 41 Ch. Div. 295. See, however, a criticism of this case in Fry, p. 677 (4th ed.).

will only be decreed if the requirements of the Statute of Frauds have been satisfied, and that is in the case where acts have been done of what is usually termed "part performance." The basis on which this exception rests has been very generally stated (*l*) to be the fraud or injustice that would result from permitting the statute to be made use of under such circumstances; but inasmuch as there are cases where no relief will be given, although the fraud that results from setting up the statute is fully as great as in others where that relief is granted (*e.g.*, payments of premium or instalments of rent (*m*)), this, though correct as far as it goes, cannot be an adequate explanation (*n*). The true reason is, that in a suit founded on such part performance, the defendant is "charged," not upon the contract itself (which is the only case the statute has in view), but upon the equities resulting from the acts done in execution of the contract: for the matter has then advanced beyond the stage of contract, and the equities in question cannot be administered unless the contract is regarded (*o*).

The doctrine of part performance applies not only where there has been no written agreement at all (*p*), but to eke out one which is insufficient under the statute (*q*), or which for some other reason, such as the want of a stamp, cannot be given in evidence (*r*). As it rests, however, on a principle akin to estoppel (*s*), it only applies where the acts of the party to be charged have caused a change of circumstances in the other party (*t*); but where this has happened it makes no difference that the former deny the agreement altogether (*u*). It may be observed that it is the "change of circumstances" in the party seeking to enforce the agreement which really constitutes part performance; for no consequence can be attached to acts of part performance in themselves on the part of the person sought to be charged (*x*).

The acts of part performance, however, need not have been done by the party seeking specific performance himself: it is sufficient if they have been done with his authority (*y*), or by a person (*e.g.*, a sub-lessee) claiming under him, and able to enforce a liability

(*l*) See cases under this head, *passim*.

(*m*) *Thuraby v. Eccles*, 70 L. J. Q. B. 91.

(*n*) Per Cotton, L. J., in *Hunt v. Wimbledon Local Board*, 4 C. P. Div. 48, and *Britain v. Rossiter*, 11 Q. B. Div. 123.

(*o*) Per Lord Selborne, L. C., in *Maddison v. Alderson*, 8 App. Ca. 467.

(*p*) *Wills v. Stradling*, 3 Ves. 378.

(*q*) *Powell v. Lovegrove*, 8 D. M. & G. 357.

(*r*) *Miller v. Finlay*, 5 L. T. 510.

(*s*) Pollock on Contracts, p. 656 (7th ed.).

(*t*) Fry, p. 260.

(*u*) *Farrall v. Davenport*, 3 Giff. 363; *affd.*, 8 Jur. N. S. 1043.

(*x*) *Caton v. Caton*, L. R. 1 Ch. 187; *affd.*, L. R. 2 H. L. 127.

(*y*) *Trefield v. Roberts*, 10 T. L. R. 437.

against him (*z*). On the other hand, they must always have been done by the person asserting the agreement, with the knowledge of the person sought to be charged that they were being done on the faith of the agreement (*a*); and such knowledge must, of course, be clearly brought home to the latter (*b*). Hence a parol agreement for a lease by a tenant for life with power to grant leases cannot bind the remainderman (*c*), unless expenditure has been incurred on the faith of the agreement to the knowledge of the latter (*d*). And it has even been held that part performance, by possession and expenditure, of a parol agreement by a tenant for life with a power of leasing, will not be sufficient to support a decree for specific performance against him if the lease would be prejudicial to the remainderman (*e*).

The agreement of which specific performance is sought must, as in other cases (*f*), be definite (*g*) and complete (*h*); acts of part performance which are merely preparatory to its completion, *e.g.*, the performance of a condition precedent, are not sufficient (*i*). Thus even the act, by an intending lessee, of obtaining from a third party the release of a right to a lease has been held not to be a part performance, within the rule, of a verbal agreement by which on his doing that act he is to have a lease himself (*k*). The terms, moreover, of the agreement must be capable of being estimated with sufficient certainty (*l*); but in case of adequate part performance the Court will, so far as it can, ascertain those terms, so as to give effect to the agreement (*m*), or to prevent a performance of it, not really in accordance with those terms, which may be asked for (*n*). The agreement, too, set up by the party seeking specific performance must appear to be the very same as that which has been partly performed (*o*); and he will be entitled to prove the entire agreement which the acts relied upon were intended partly to perform (*p*).

(*z*) *Williams v. Evans*, L. R. 19 Eq. 547.

(*a*) *Fry*, *ubi sup.*

(*b*) See *Dann v. Spurrier*, 7 Ves. 231, per Lord Eldon, L. C.

(*c*) *Blore v. Sutton*, 3 Mer. 237.

(*d*) *Shannon v. Bradstreet*, 1 Sch. & L. 52.

(*e*) *Trotman v. Fleaher*, 3 Giff. 1.

(*f*) *Supra*, p. 347.

(*g*) *Richards v. North London Ry. Co.*, 20 W. R. 194.

(*h*) See *Thynne v. Glengall*, 2 H. L. C. 131; *Bertel v. Nevezuz*, 39 L. T. 257.

(*i*) *Maddison v. Alderson*, *ubi sup.*, per Lord Selborne, L. C., disapproving *Parker v. Smith*, 1 Coll. 608.

(*k*) *O'Reilly v. Thompson*, 2 Cox, 271.

(*l*) *Price v. Salusbury*, 14 L. T. 110.

(*m*) *Boardman v. Mostyn*, 6 Ves. 467; *Wilson v. West Hartlepool Ry. Co.*, 2 D. J. & S. 475, per Turner, L. J.; *Mundy v. Jolliffe*, 5 My. & Cr. 167.

(*n*) *Farmers' Dairy Co. v. Enkel*, W. N. 1890, p. 126.

(*o*) *Lindsay v. Lynch*, 2 Sch. & L. 1.

(*p*) *Sutherland v. Briggs*, 1 Hare, 26.

The acts in question, it has been said (*q*), must be unequivocally referable to the agreement, i.e., "there must be a necessary connection between" them "and the interest in the land which is the alleged subject-matter of the agreement; it is not sufficient that" they "are consistent with the existence of such an agreement, or that they suggest or indicate the existence of *some* agreement, unless such agreement has reference to the subject-matter": and "they must be such as could have been done with no other view or design than to perform the agreement" (*q*). For instance, the making of repairs, alterations, or improvements in the premises by an intending lessor under a verbal agreement for letting them is not part performance within the rule (*r*); whilst, on the other hand, the making of such alterations (by an intending vendor under a verbal agreement for building and sale) at the instance of the other party and in consequence of frequent visits of the latter to the site, has been held to be sufficient (*s*). This rule has been expressed by saying that the acts must be of such a nature that if stated they would of themselves presume the existence of some agreement, and then parol evidence is admissible to show what the agreement is (*t*); while an act which, though in truth done in pursuance of an agreement, admits of explanation without supposing an agreement, is not sufficient (*u*). For the true principle seems only to require that the acts of part performance should be such as must be referred to *some* contract, and may be referred to the alleged one,—that they prove the existence of some contract, and are consistent with the contract alleged (*x*). Both parties, too, must be found acting on the footing of an agreement, so that the mere execution, for instance, of an instrument of demise, not delivered to the other party, is no part performance of an agreement to grant it (*y*).

The delivery of possession to an intending lessee is of itself a sufficient part performance to take the case out of the statute—at the instance of the lessee equally as of the lessor (*z*),—because such possession is not explicable except on the supposition of an

(*q*) Per Baggallay, L. J., in *Alderson v. Maddison*, 7 Q. B. Div. 174; *affd.*, 8 App. Cas. 467.

(*r*) *Whitlick v. Mosley*, C. & E. 86, Field, J.

(*s*) *Dickinson v. Barrow*, [1904] 2 Ch. 389.

(*t*) *Fram v. Dawson*, 14 Ves. 386.

(*u*) *Dale v. Hamilton*, 5 Hare, 369,

per Wigram, V.-C. As to the application of the rule in partnership agreements for a lease, see *Isaacs v. Evans*, 16 T. L. R. 113, 480.

(*x*) Fry, p. 257.

(*y*) *Phillips v. Edwards*, 33 Beav. 440.

(*z*) *Wilson v. West Hartlepool Ry. Co.*, 2 D. J. & S. 475.

agreement (*a*); and *à fortiori* if followed by the expenditure of money upon improvements on the premises, on the faith of the agreement (*b*), and with the knowledge and without the objection of the other party (*c*). And even if possession has been acquired without the lessor's consent, but has been subsequently acquiesced in by him, this, if followed by such expenditure (*d*), or by the execution of repairs only referable to an agreement for a lease (*e*), will be sufficient. On the other hand, where possession has been obtained originally without consent and no act has been done which can be considered as done under the agreement, specific performance will not, as it seems, be decreed (*f*). So the mere fact that acts have been done on the premises which would, except under an agreement, have amounted to a trespass, is not sufficient (*g*); nor is a possession which has been obtained wrongfully (*h*). And possession given under an agreement cannot be considered as a part performance of that agreement as substantially varied afterwards (*i*).

There is, however, as it seems, one case where even the delivery of possession is not a sufficient act on which to found the relief of specific performance, and that is the case of an agreement for a lease by a corporation not under seal; for, as already pointed out (*k*), the requirement of a seal to contracts by a corporation in no way resembles the requirement of the Statute of Frauds, which, while merely excluding evidence, leaves the validity of the contract itself unaffected. Specific performance would, therefore, in such case probably not be granted (*l*), unless power to enter into contracts under certain restrictions without seal is conferred upon the corporation by some statute (*m*). But even in the case of

(*a*) *Morphett v. Jones*, 1 Swanst. 172; *Pain v. Coombs*, 1 De G. & J. 34; *Bowers v. Cator*, 4 Ves. 91; *Maddison v. Alderton*, 8 App. Ca. 467, per Lord Blackburn.

(*b*) *Lester v. Foxcroft*, 2 Wh. & Tud. L. C. 460 (7th ed.); *Farrall v. Davenport*, 3 Giff. 363; affd., 8 Jur. N. S. 1043; *Reddin v. Jarman*, 16 L. T. 449.

(*c*) *Ramsden v. Dyson*, L. R. 1 H. L. 129, per Lord Kingsdown; followed in *Plimmer v. Mayor of Wellington*, 9 App. Ca. 699.

(*d*) *Gregory v. Mighell*, 18 Ves. 328.

(*e*) *Shillbeer v. Jarvis*, 8 D. M. & G. 79.

(*f*) *Faulkner v. Llewellyn*, 31 L. J. Ch. 549, where a motion to compel the intending lessee to pay into Court rent for the year during which he occupied was refused.

(*g*) *Phillips v. Alderton*, 24 W. R. 8.

(*h*) Sug. V. & P. 151 (14th ed.), citing *Cole v. White*, 1 Bro. C. C. 409.

(*i*) *Price v. Salusbury*, 32 Beav. 446; affd., 14 L. T. 110; *Chappell v. Gregory*, 34 Beav. 250.

(*k*) *Aule*, p. 17.

(*l*) In Ireland, however, there has been a decision to the contrary: *Stevens's Hospital v. Dyas*, 15 Ir. Ch. Rep. 405. And a view in conformity with this decision is expressed in Fry, p. 281 (4th ed.), where, however, the dicta in *Hunt v. Wimbledon Local Board*, *infra*, are not cited.

(*m*) *Wilson v. West Hartlepool Ry. Co.*, 2 D. J. & S. 475, per Turner, L. J.; explained by Cotton, L. J., in *Hunt v. Wimbledon Local Board*, 4 C. P. Div. 48.

agreements by corporations, if the lessee thus let into possession is allowed by the lessors to incur expenditure (*n*) on the premises on the faith of his having a lease, specific performance of the agreement will be decreed (*o*); for this raises an equity independent of contract (*p*).

In the next place, where possession has been obtained *before* the alleged agreement—*e.g.*, in the case of a tenant holding over under a parol agreement for a new lease,—the continuance in possession is not in itself a sufficient part performance, for this is referable to the holding over (*q*). But if it can be unequivocally referred to the agreement, possession taken before, but continued after, it has been entered into may be sufficient (*r*). And in this case also the expenditure by the tenant (or by his sub-lessee (*s*)) of money upon the property will operate strongly to take the case out of the statute (*t*), provided it is of such a kind as cannot reasonably be referred to a mere yearly tenancy (*u*), and provided it has not been laid out in the mere hope or expectation, not created or encouraged by the landlord, of an extended term (*x*). The payment, moreover, by such a tenant of an increased rent—even of only a single instalment (*y*)—on the footing of a new agreement is sufficient part performance of it (*z*), if (as it seems) it can be shown that it was made in respect of the particular land and the particular interest in the land which is the subject of such new agreement (*a*). Possession, too, after the expiration of a lease, which is only referable to a contract for renewal, is part performance of such contract (*b*).

Defences to the action.—There being a complete contract, and the provisions of the Statute of Frauds (in the absence of sufficient part performance) complied with, there is a *prima facie* case for specific performance. But that relief, as already stated (*c*), is

(*n*) Cf. cases cited *supra*, notes (*b*), (*c*), (*d*).

(*o*) *Crook v. Corporation of Seaford*, L. R. 6 Ch. 551.

(*p*) *Hunt v. Wimbledon Local Board*, *ubi sup.*

(*q*) *Wills v. Stradling*, 3 Ves. 378; *Re National Savings Bank Association*, 15 W. R. 753.

(*r*) *Hodson v. Heuland*, [1896] 2 Ch. 428; *White v. Whitewood*, 13 T. L. R. 409.

(*s*) *Williams v. Evans*, L. R. 19 Eq. 547.

(*t*) *Wills v. Stradling*, *supra*.

(*u*) *Mundy v. Jolliffe*, 5 My. & Cr. 167; *Brennan v. Bolton*, 2 Dru. & War. 349.

(*x*) *Ramsden v. Dyson*, L. R. 1 H. L. 129, per Lord Kingsdown (followed in *Plimmer v. Mayor of Wellington*, 9 App. Ca. 699); *Pilling v. Armitage*, 12 Ves. 78.

(*y*) *Nunn v. Fabian*, L. R. 1 Ch. 35.

(*z*) *Wills v. Stradling*, *supra*; *Miller v. Sharp*, [1899] 1 Ch. 622.

(*a*) *Humphreys v. Green*, 10 Q. B. Div. 148, per Baggallay, L. J. (diss. Brett, L. J.).

(*b*) *Dowell v. Dew*, 1 Y. & C. 345; *affd.*, 12 L. J. Ch. 158; Fry, pp. 264-5.

(*c*) *Supra*, p. 345.

discretionary, and though the discretion is exercised, not arbitrarily, but in accordance with fixed principles—for all that is meant is that the Court, in any particular case, has regard to the conduct of the plaintiff and to circumstances outside the contract itself (*d*),—there are, in awarding the relief, certain grounds the existence of which will be sufficient to entail its refusal, and which, consequently, may be set up by way of defence to the action. A full discussion of the principles involved does not, of course, fall within the scope of a work like the present, and only those cases which illustrate them in their most ordinary application to *agreements for leases and no others* are treated of here (*e*).

These cases may conveniently be discussed under the following heads:—

1. *Uncertainty*.—The want of a reasonable certainty, having regard to the subject-matter of the agreement, will afford a good answer to the action (*f*). Of an agreement for a lease, for instance, of which different parts are inconsistent with one another, specific performance will be refused on this ground (*g*). So an agreement to grant a lease “agreeably to our covenants,” in a case where there was a conflict as to what those covenants were (*h*), and an agreement to grant a lease subject to the expenditure of money by the intending lessee in improvements upon the premises, no definite sum being named (*i*), have been held too uncertain. For the same reason, the relief has been refused in an agreement to take a house at a certain rent, “if put into thorough repair and the drawing-rooms handsomely decorated according to the present style: paint required both inside and out, although perhaps for some parts one coat might be sufficient” (*k*). But an agreement to let a house and put it into decorative repair (*l*), and an agreement to take a lease containing a stipulation that the lessee should do “all repairs, painting, papering, decorating, &c.,” himself (*m*), have been held to be sufficiently certain. The fact of indefinite words, *e.g.* (as in the last case), “et cetera,” being used in the agreement does not *necessarily* make it uncertain, although that result may ensue (*n*);

(*d*) Fry, p. 17.

(*e*) A lease being a sale *pro tanto*, other principles applicable to the subject may be found in the very numerous cases relating to sales.

(*f*) Fry, pt. 3, c. 4.

(*g*) *Callaghan v. Callaghan*, 8 Cl. & F. 374.

(*h*) *Jeffery v. Stephens*, 8 W. R. 427.

(*i*) *Gardner v. Fooks*, 15 W. R. 388.

(*k*) *Taylor v. Portington*, 7 D. M. & G. 328.

(*l*) *Samuda v. Lawford*, 4 Giff. 42. But the part of the agreement which relates to the execution of repairs can only be enforced by damages: see *ante*, p. 228, and *infra*, p. 380.

(*m*) *Dear v. Verity*, 38 L. J. Ch. 297, 486.

(*n*) *Price v. Griffith*, 1 D. M. & G. 80.

for such words may be sufficiently understood by reference to the words to which they are added and the surrounding circumstances of the case (*o*).

The uncertainty which is relied on as a defence to the action must be as to a matter of substance (*p*). An uncertainty in merely subordinate portions of an agreement sufficiently certain in all its material parts will be no ground for resisting specific performance, especially where the agreement has been partly executed (*q*); for original uncertainty may be removed by user and course of dealing between the parties (*r*). Thus, where an agreement specified certain repairs and "other works" which were to be carried out by the lessee at a certain expenditure, specific performance was decreed on its being shown that the specified repairs would cost nearly the whole of the amount mentioned, and consequently that the "other works" could only be of a trifling description (*s*). And uncertainty of description of the subject-matter may be got over by the election of one party to the contract, where the effect of the contract is to give such a right of election (*t*): for instance, an agreement to let a glebe "except thirty-seven acres" was held sufficiently certain for specific performance, on the ground that it gave the right of selecting the excepted portions to the lessor (*u*).

2. *Non-performance of condition*.—Where an agreement to grant a lease is conditional, *i.e.*, contingent upon the performance of some act or the happening of some event, specific performance cannot be obtained until the condition has been fulfilled (*x*). Where such agreement is expressed, for instance, to be conditional on the lessor's ability to grant the lease, the existence of such ability must be shown before the lessee can sue for specific performance (*y*). In no case can that relief be claimed by a party who has himself failed to perform the condition; *e.g.*, where the agreement is to take a lease to a nominee of the intending tenant or to a company he proposes to form, he cannot claim specific performance if he has failed to appoint the nominee or to form the company (*z*). So where a person agreed to accept a lease conditionally on a retail

(*o*) *Powell v. Lovegrove*, 8 D. M. & G. 357; *Parker v. Taswell*, 2 De G. & J. 559.

(*p*) *Oxford (Mayor of) v. Crow*, 69 L. T. 228.

(*q*) *Parker v. Taswell*, *supra*.

(*r*) *Oxford v. Provand*, L. R. 2 P. C. 135.

(*s*) *Baumana v. James*, L. R. 3 Ch. 508.

(*t*) Fry, p. 147.

(*u*) *Jenkins v. Green*, 27 Beav. 437, cited *ante*, p. 100.

(*x*) Fry, p. 424 (4th ed.).

(*y*) *Abbot v. Blair*, 8 W. R. 672.

(*z*) *Williams v. Brisco*, 22 Ch. Div. 441.

licence for the premises being obtained by the lessor, it was held that the latter was not entitled to specific performance where the only licence obtainable was one subject to a serious qualification (*a*). And such a condition may be implied. Thus specific performance will not be given of a "preliminary" building agreement, which cannot be read as a complete contract until the particulars of the houses to be built have been agreed between the parties (*b*). So an agreement by an intending lessor to finish and deliver a house to an incoming tenant, who is to be under covenants to repair, implies an undertaking to deliver it in complete tenantable repair, and cannot be enforced by him until that undertaking is fulfilled (*c*); though it is otherwise where the lessor's breach of duty, not going to the whole consideration for the lessee's promise, amounts only to a partial failure of consideration for which damages may be given (*d*).

Failure in the performance, however, of a condition may be waived (*e*); but the occupation and payment of rent by the intending lessee during a considerable period is not in itself sufficient to amount to a waiver, if capable of being otherwise explained (*f*). Thus, where a lessee, on the faith of an undertaking by the intending lessor to make the premises thoroughly dry for the purposes of a business to be carried on there, took possession and paid rent (though always under protest) for two years, it was held that this did not amount to acquiescence so as to entitle the lessor who had not performed the condition to a decree for specific performance (*g*).

3. *Defect of title*.—An action by the intending lessor for specific performance of the agreement cannot succeed if he has a bad title (*h*), and this even if the resistance originally offered by the intending lessee be founded on grounds which are wholly unsustainable (*i*). For instance, trustees of leasehold premises on trust for sale cannot obtain specific performance of an agreement to underlet them (*k*). Nor will the offer of an indemnity by the lessor in case of eviction make any difference in this respect (*l*). Under special circumstances, however (*e.g.*, of negligence), a lessee

(*a*) *Mollen v. Snowball*, 4 D. F. & J. 143.

(*b*) *Wood v. Silcock*, 50 L. T. 251.

(*c*) *Tildesley v. Clarkson*, 30 Beav. 419.

(*d*) *Oxford v. Provan*, L. R. 2 P. C. 135.

(*e*) See *Nash v. Cochrane*, 3 Jur. 973; *Modlen v. Snowball*, *supra*; Fry, p. 427, citing *Beatson v. Nicholson*, 6 Jur. 620.

(*f*) *Lamare v. Dixon*, L. R. 6 H. L. 414.

(*g*) *Id.*

(*h*) *Fildes v. Hooker*, 2 Mer. 424.

(*i*) *Baskcomb v. Phillips*, 29 L. J. Ch. 380.

(*k*) *Evans v. Jackson*, 8 Sim. 217.

(*l*) *Fildes v. Hooker*, 3 Madd. 193.

who entered under an agreement for a term which the lessor, by reason of a necessary licence not being obtainable for so long, was unable to grant, was decreed (subject to receiving compensation) to accept such a term as the lessor could convey, with a covenant to grant the further term at its expiration (*m*).

In the same way, it may be observed that where the intending lessor is unable to convey in consequence of his title being defective, specific performance will not be granted to the lessee (*n*). If, however, his inability is one merely to convey *all* the premises included in the agreement, specific performance may be had by the lessee of as much as can be granted with a proportionate abatement of rent (*o*); for a mere difference in quantity has never been held a bar to that relief, the incapacity to perform an agreement in what the Court holds to be non-essential terms being allowed to be the subject of compensation (*p*). It would seem that this forms an exception to the general rule requiring, for specific performance, mutuality in the contract between the parties at the time of entering into it (*q*). Where an agreement was made to demise premises in which an equitable interest was outstanding in a third person, it was held that the intending lessee was bound to accept a lease in which such third person joined, and that he was not justified in insisting on a release being obtained from him so that the lessor might make a valid demise alone (*r*). Though acts on the part of the intending lessee may amount to a waiver of his right to investigate the title, yet specific performance will not be decreed against him if it be made to appear collaterally that the lessor cannot make a title according to his contract (*s*).

4. *Hardship*.—The Court will not enforce specific performance of an agreement for a lease if the result would be to impose great hardship on either of the parties to it (*t*), the question of hardship being one, as a rule (*u*), to be judged of at the time the agreement is entered into, and not by reference to subsequent circumstances (*x*). But the mere fact that such relief may or will produce

(*m*) *Hanbury v. Litchfield*, 2 My. & K. 629. (The premises were copyhold.)

(*n*) *Bauman v. Matthews*, 4 L. T. 783.

(*o*) *Burrow v. Scammell*, 19 Ch. D. 175.

(*p*) *McKenzie v. Heslith*, 7 Ch. D. 675.

(*q*) See Fry, pp. 209–211, citing *Dyas v. Cruise*, 2 Jon. & L. 460, where dicta of Lord Redesdale in *Lawrenson v.*

Butler, 1 Sch. & L. 13, are disapproved by Lord St. Leonards. Cf. p. 358, *supra*.

(*r*) *Reeves v. Gill*, 1 Beav. 375.

(*s*) *Warren v. Richardson*, You. 1.

(*t*) *Talbot v. Ford*, 13 Sim. 173.

(*u*) Some of the instances given below show that the rule has not always been observed.

(*x*) *Revell v. Hussey*, 2 Ball & B. 280; Fry, p. 183.

inconvenience to the parties is not sufficient. Thus it ought not to be withheld merely because the contract is concerned with an undivided share of lands, as in the case of an agreement to grant a lease of minerals in respect of an undivided moiety (*y*).

An intending lessee, for instance, cannot obtain this relief in the case of an agreement for a lease (entered into before the Conveyancing Act (*z*)) by a mortgagor, which, in consequence of the refusal of the mortgagee's consent, can only be executed by his paying off the mortgage debt (*a*); nor of a similar agreement by a mortgagee which both parties understood to be subject to the consent of the mortgagor, for the absence of that consent might inflict serious injury on the mortgagee upon the question of account to the mortgagor (*b*). So where the tenant in breach of an agreement for a lease repaired certain houses included in the demise instead of rebuilding them, but at a considerable outlay, specific performance of the contract to build was refused on this ground (*c*).

But it is otherwise if the necessary consent of a third person, *e.g.*, a superior landlord, is to be obtained on payment of a reasonable sum of money (*d*); and even if there be a stipulation by the intending lessor to pay a specified sum as liquidated damages in case of his refusal, he cannot escape specific performance by refusing to apply for the consent and paying the stipulated sum, for such a clause only confers the option of receiving that sum on the other party, and the amount is merely named in order to settle what the damages the other party may thus claim are to be (*e*).

The possibility of a forfeiture being incurred by the intending lessor in the event of his granting the lease is a circumstance of hardship (*f*); but the mere apprehension of such a result is not enough, as it must clearly appear that the forfeiture will follow (*g*). Nor will the principle apply where the forfeiture, if incurred, would be really the result of other acts of the defendant himself (*h*).

The destruction of the subject-matter of an agreement for a lease affords no answer to an action for specific performance by the intending lessor, for if there be a good title the property passes on the execution of the agreement (*i*). But if the agreement be

(*y*) *Hexter v. Pearce*, [1900] 1 Ch. 341.

(*z*) *Ante*, p. 61.

(*a*) *Costigan v. Hastler*, 2 Sch. & L. 160; *Howe v. Hunt*, 31 Beav. 420.

(*b*) *Franklin v. Ball*, 33 Beav. 560, cited *ante*, p. 60.

(*c*) *London (City of) v. Nash*, 3 Atk. 512; cited *infra*, p. 379.

(*d*) *Hilton v. Tipper*, 18 L. T. 626. See now, as to this, *ante*, p. 273.

(*e*) *Long v. Bowring*, 33 Beav. 585.

(*f*) *Fry*, p. 188.

(*g*) *Paxton v. Newton*, 2 Sm. & G. 487.

(*h*) *Helling v. Lumley*, 3 De G. & J. 493.

(*i*) *Fry*, p. 398.

in its inception conditional, *e.g.*, on the execution of certain repairs by the lessor, which he fails to do, this will be otherwise, for the property will then pass only on the performance of the condition (*k*).

5. *Breach of trust*.—Specific performance will not be decreed where to do so would necessitate a breach of trust, or of a prior contract with a third person, or where it would compel a person to do what he is not lawfully competent to do (*l*). Thus it will be refused as against trustees who have entered into an agreement for a lease in excess of their leasing powers (*m*), or who have entered into a covenant for renewal which is either *ultra vires* (*n*), or the performance of which would be a fraud on the power (*o*). But where a portion of the relief claimed can be given without infringing the above rule—*e.g.*, where the agreement purports to convey a term greater than is permitted by the power (*p*)—the intending lessee may obtain specific performance *pro tanto* (*q*); unless he has been aware from the beginning of the lessor's inability, without committing a fraud on the power, to demise the premises in accordance with the agreement (*r*).

6. *Insolvency*.—The general principle is, that the insolvency of the intended lessee is a valid ground for refusing specific performance at his instance (*s*); but for this, proof must be given of general insolvency on his part (*t*). The agreement, however, is not *ipso facto* determined even by his bankruptcy (*u*), the effect of which is to vest it in his trustee (*x*), who may either take to it or disclaim it (*y*); but if he adopt the former course, he must, as a condition of obtaining specific performance, enter personally into the lessee's covenants (*z*). Moreover, the fact that the intended lessee has become insolvent will not, in the absence of evidence showing that the agreement was entered into upon considerations merely personal to him (*a*), prevent specific performance at the

(*k*) *Counter v. Macpherson*, 5 Moo. P. C. 83.

(*l*) Fry, p. 178.

(*m*) *Harnett v. Yielding*, 2 Sch. & L. 549.

(*n*) *Bellringer v. Blagrove*, 1 De G. & S. 63.

(*o*) *Gas Light, &c., Co. v. Towse*, 35 Ch. D. 519.

(*p*) *Byrne v. Acton*, 1 Bro. P. C. 186.

(*q*) *Neale v. Mackenzie*, 1 Keen, 474.

(*r*) *O'Rourke v. Perotval*, 2 Ball & B. 58.

(*s*) *Brooke v. Hewitt*, 3 Ves. 253; *Buckland v. Hall*, 8 Ves. 92; *Price v. Asheton*, 1 Y. & C. Ex. 441.

(*t*) *Neale v. Mackenzie*, *supra*; *Pearson v. Knapp*, 1 My. & K. 312, per Leach, M. R.

(*u*) *Buckland v. Papillon*, L. R. 2 Ch. 67.

(*x*) 46 & 47 Vict. c. 52, s. 54.

(*y*) See *post*, p. 451.

(*z*) *Powell v. Lloyd*, 2 Y. & J. 372.

(*a*) *Flood v. Finlay*, 2 Ball & B. 9.

instance of a party to whom he has assigned (*b*): nor does the existence of a mere power of re-entry (so framed as not to work an actual cesser of the term) in case of such insolvency make any difference in this respect (*c*).

But where a lessee in insolvent circumstances suffered another person to become apparent owner of the demised premises, though under a secret trust for himself, and the landlord, supposing the trustee to be the rightful owner and confiding in his solvency, entered into an agreement to grant him a new lease, specific performance, at the instance of the original lessee, of such agreement was refused as against the landlord (*d*). And specific performance will not be decreed, at the instance of the assignee, of an agreement to grant a lease, one of the covenants of which is not to assign without the lessor's licence (*e*), unless the benefit of that proviso has been waived (*f*).

7. *Misrepresentation and fraud*.—A misrepresentation, *i.e.*, a statement untrue even though not known to be untrue, will in general debar the person guilty of it from specific performance, provided it be of a material fact (and not a mere subject of speculation (*g*)), made with a view to induce the other party to enter into the agreement, and relied upon by him (*h*). And it makes no difference, if there has been such reliance (*i*), that the other party may to a certain extent have resorted to other means of knowledge, *e.g.*, to a cursory inspection of the property agreed to be let (*k*). On the other hand, such misrepresentation will not prevent the other party from claiming specific performance: but a lessee cannot demand that relief with compensation if he continues to hold under the agreement with full knowledge of all the facts, for this conduct amounts to acquiescence (*l*).

A fortiori will it be a ground for refusing the relief if the misrepresentation be made with a knowledge of its untruth, *i.e.*, if it amount to fraud. Thus a party cannot obtain specific performance of an agreement for a lease which he has procured by fraudulent statements as to his pecuniary position (*m*). And though silence

(*b*) *Crosbie v. Tooke*, 1 My. & K. 431.

(*c*) *Morgan v. Rhodes*, 1 My. & K. 435.

(*d*) *O'Herlihy v. Hedges*, 1 Sch. & L. 123.

(*e*) *Weatherall v. Geering*, 12 Ves. 504; *ante*, p. 269.

(*f*) *Dowell v. Dew*, 1 Y. & C. 345; *affd.*, 12 L. J. Ch. 158.

(*g*) *Higgins v. Samels*, 2 J. & H. 460.

(*h*) Fry, pt. 3, c. 13. As to "want of fairness," see further *id.*, c. 5, citing *Willan v. Willan*, 16 Ves. 72.

(*i*) *Olapham v. Shillito*, 7 Beav. 146.

(*k*) *Higgins v. Samels*, *supra*.

(*l*) *Vigers v. Pike*, 8 Cl. & F. 562.

(*m*) *Willingham v. Joyce*, 3 Ves. 168; *Pearson v. Knapp*, 1 My. & K. 312, per Leach, M. R.

does not as a rule constitute fraud(*n*), the concealment of a material fact, if it operate unfairly, may amount to it: *e.g.*, where a lessee obtained an agreement for a renewed lease on the surrender of the one under which he held, he knowing and the lessor not knowing that the latter lease depended on the life of a person then *in extremis* (*o*). So an intending lessor will not obtain specific performance if he is aware of some latent defect in the premises which he fails to disclose to the lessee (*p*); but this principle does not apply where the latter, after stipulating for certain specific repairs, takes possession in spite of a warning that more are wanted (*q*). Any contrivance, again, on the part of an intending lessee (*e.g.*, of minerals), better informed than the lessor as to value, to hurry him into an agreement without giving him an opportunity of procuring advice or information, will be sufficient for refusal of the relief (*r*).

Inadequacy of consideration between the parties may be so great as to prove fraud (*s*); but short of this it is not a ground for refusing specific performance (*t*).

8. *Mistake and variation.*—One party cannot obtain specific performance of an agreement for a lease if the other party has entered into it under a mistake (*u*); and if he attempt to enforce it the party proceeded against may give parol evidence to show what the agreement really was,—*i.e.*, he may endeavour to set up what is called a “variation.” The doctrine of “variation,” however, is not founded necessarily on mistake, but may be based on acquiescence: thus, where a covenant of renewal had been acted on during a long course of years in a manner not in conformity with its terms, which specified for renewal by increase not of rent but of fine, it was held that specific performance ought not to be granted according to those terms, but might be decreed on the plaintiff submitting to a “conscientious modification” of them (*x*).

The principle applies notwithstanding the general rule excluding parol evidence to vary written documents (*y*), and the provisions

(*n*) Fry, p. 311; *Walters v. Morgan*, 3 D. F. & J. 718, per Lord Campbell, L. C.

(*o*) *Ellard v. Lord Llandaff*, 1 Ball & B. 241. See this case discussed in *Turner v. Green*, [1895] 2 Ch. 205; and see the law on the point stated by Warrington, J., in *Carlisle v. Salt*, [1906] 1 Ch. 335.

(*p*) Per Stuart, V.-C., in next-cited case.

(*q*) *Cook v. Waugh*, 2 Giff. 201.

(*r*) *Walters v. Morgan*, 3 D. F. & J. 718.

(*s*) *Callaghan v. Callaghan*, 8 Cl. & F. 374.

(*t*) *Haywood v. Cope*, 25 Beav. 140.

(*u*) *Richards v. North London Ry. Co.*, 20 W. R. 194; Fry, pt. 3, c. 15.

(*x*) *Davis v. Hone*, 2 Sch. & L. 341.

(*y*) *Townshend (Lord) v. Stangroom*, 6 Ves. 328.

of the Statute of Frauds (*z*): for such evidence is given, not to establish a contract, but to rebut an equity, which the plaintiff insists has arisen out of a contract (*a*). Thus, on an application by the intending lessee for specific performance of a written agreement for a lease, verbal evidence will be received on the part of the lessor of an agreement between the parties that the rent reserved should be clear of taxes (*b*), or that the agreement was intended to be subject to the restrictive covenants usual in brewers' leases (*c*). Similarly, in an action by the intending lessee for specific performance of an agreement to let to him at a certain rent premises to be erected at a certain cost, the lessor may set up a contemporaneous parol agreement that if the outlay in building exceeded the stipulated sum the rent should be raised in proportion (*d*). So, on the other hand, in an action brought by the lessor, parol evidence has been received on the part of the lessee of a stipulation as to the insertion of a usual clause which he understood on reasonable grounds would form part of the agreement (*e*). In such cases the plaintiff is given (if he so desire, in preference to having his action dismissed) specific performance of the agreement with the variation (*f*):—except, however, where the parol variation set up by the defendant does not show a mere mistake in the reduction of the agreement into writing, but that one party understood one thing and the other another (*g*), or where the enforcement of the variation would be a hardship on the defendant (*h*), as where the plaintiff has refused throughout to accept the agreement set up by the latter (*i*). But very strong evidence will be required to prove that the parol variation set up by the defendant by way of showing a mistake in a written agreement gives the true account of the transaction (*k*).

Where, however, the variation set up by the defendant is really a subsequent contract—and therefore does not fall properly under the head of mistake at all (*l*),—parol evidence will be inadmissible under the Statute of Frauds (*m*), except to prove fraud on the part of the plaintiff (*n*), or where the parol agreement has been in part executed (*o*), and is sufficiently certain (*p*). And if such evidence

(*z*) *Clarke v. Grant*, 14 Ves. 519.

(*a*) *Fry*, p. 330.

(*b*) *Joynes v. Statham*, 3 Atk. 388.

(*c*) *Barnard v. Cave*, 26 Beav. 253.

(*d*) *Williams v. Jones*, 36 W. R. 573.

(*e*) *Ricketts v. Bell*, 1 De G. & S. 335.

(*f*) *Clarke v. Moore*, 1 Jon. & L. 723.

(*g*) *Fry*, p. 337.

(*h*) *Legal v. Miller*, 2 Ves. sen. 299.

(*i*) *Lindeay v. Lynch*, 2 Soh. & L. 1.

(*k*) *Wood v. Searoth*, 2 K. & J. 33.

(*l*) *Fry*, p. 350.

(*m*) *Jordan v. Sawkins*, 1 Ves. 402.

(*n*) *Legal v. Miller*, *supra*.

(*o*) *Clarke v. Grant*, 14 Ves. 519.

(*p*) *Dear v. Verity*, 38 L. J. Ch. 297, 486.

go to show, not that the original agreement has been put an end to, but merely that it has been modified, its rejection leaves that agreement intact, so that specific performance of it will be given (*q*).

On the other hand, the rule which heretofore has undoubtedly prevailed (*r*) is that specific performance will not be decreed with a parol variation (in rectification of an alleged mistake) set up by the plaintiff (*s*):—as in a case where an intending lessor alleged that the real agreement between the parties differed from that contained in the written agreement in the circumstance that it was stipulated that the rent payable should be clear of all taxes (*t*), or that certain restrictions on the user of the premises should be imposed (*u*). But if the variation set up by the plaintiff be one really in favour of the defendant, the relief may, where the plaintiff has conducted himself with perfect good faith (*x*), be given to him (*y*), except where the non-performance on the part of the defendant has arisen from an incapacity to do an act which to the knowledge of both parties is necessary to be done before the lease can be granted (*z*). How far the rule in question may now be said to be superseded by the provision of the Judicature Acts (*a*), under which jurisdiction is vested in the Court to grant such remedies as may be necessary for the final determination of all matters in controversy between the parties, is a matter apparently still open to some doubt. The better opinion would seem, however, to be that it is so superseded, in cases at all events where (on account of part performance) the Statute of Frauds does not create a bar (*b*), and probably in other cases also, by reason of the principle that mistake, like fraud, must be deemed an exception to the statute in equity (*c*).

In order to afford a defence to an action for specific performance, the mistake must be one as to the agreement entered into; where, for instance, the words of an agreement were certain, and the only thing not understood was the legal effect of certain expressions it

(*q*) *Price v. Dyer*, 17 Ves. 356; *Vesey v. Rashleigh*, [1904] 1 Ch. 634.

(*r*) See Fry, p. 352, where the authorities are given.

(*s*) *Townshend (Lord) v. Stangroom*, 6 Ves. 328; *Nurse v. Seymour (Lord)*, 13 Beav. 254; *Woollam v. Hearn*, 2 Wh. & Tud. L. C. 513 (7th ed.). As to rectification, see *ante*, p. 339.

(*t*) *Rich v. Jackson*, 4 Bro. C. C. 514.

(*u*) *Snelling v. Thomas*, L. R. 17 Eq. 303.

(*z*) *Walters v. Morgan*, 3 D. F. & J. 718.

(*y*) *Martin v. Pycroft*, 2 D. M. & G. 785; *Gregory v. Mighell*, 18 Ves. 328.

(*x*) *Beeston v. Stutely*, 27 L. J. Ch. 156.

(*a*) 36 & 37 Vict. c. 66, s. 24 (7).

(*b*) See *Olley v. Fisher*, 34 Ch. D. 367.

(*c*) Fry, pp. 351-3. In *May v. Platt*, [1900] 1 Ch. at pp. 622-4, Farwell, J., refers to the doctrine that a plaintiff cannot obtain specific performance of a written contract with a parol variation as a "well-settled practice"; but the point as to the effect of the Jud. Acts is not mentioned.

contained, the defence was held to have failed (*d*). And a mere omission from inadvertence to insert an intended provision in the agreement is not a mistake within the meaning of the rule: hence where, on the expiration of a tenancy in which tithe rent-charge had been paid by the tenant, an agreement was entered into for a new tenancy at the same rent, without the introduction of any stipulation as to the payment of the charge, it was held that the landlord was not entitled, in an action for specific performance of the agreement by the tenant, to insist on the insertion of a clause providing for such payment by the latter (*e*). It has further been held to be no ground for refusing to the lessor specific performance of an agreement to let a specified vein of coal at a certain dead rent and royalties, that the agreement was entered into under a mistake as to its existence, because such an agreement only amounts to a licence to enter and search for the coal, the lessees taking their chance of finding it (*f*). But specific performance will not be decreed, at the instance of the lessees, of an agreement to grant a lease of minerals, bounded by a certain "fault" supposed to run through the land in a certain direction, and believed to contain a specified number of acres, when owing to a mistake common to both parties such boundary is found to include a far greater number of acres within it (*g*). And if a material term in the agreement, such as the amount of rent, be left to be afterwards determined by a third party, specific performance will not be decreed where a mistake of such party has caused him to award it on a wrong footing (*h*).

9. *Illegality*.—The illegality of an agreement to grant a lease is, of course, a bar to specific performance (*i*). But if the agreement be lawful in its inception, and only rendered unlawful by subsequent legislation—*e.g.*, where the power to grant or renew leases by a corporation has become curtailed by statute (*k*),—the Court, though unable to carry out the contract in its entirety, will decree specific performance for such term as the statute allows (*l*).

10. *Delay*.—A strict compliance with conditions relating to time is essential (or, as the phrase runs, "time is of the essence of the

(*d*) *Powell v. Smith*, L. R. 14 Eq. 85.

(*e*) *Parker v. Taswell*, 2 De G. & J. 559.

(*f*) *Jefferys v. Fairs*, 4 Ch. D. 448.

(*g*) *Davis v. Shepherd*, L. R. 1 Ch. 410.

(*h*) *Chichester v. McIntire*, 4 Bli. N. S. 78.

(*i*) Fry, pt. 3, c. 9.

(*k*) *Ante*, p. 50.

(*l*) *Bettesworth v. Dean of St. Paul's*, 1 Bro. P. C. 240.

contract") only where it is the real intention of the parties that this shall be the case, as distinguished from where a stipulation to that effect is inserted as a formal part of the agreement (*m*). And any express stipulation that time is to be material must be clear and certain, for the mere fact that a certain time is mentioned within which an act must be done is not sufficient; thus an agreement to grant a lease on payment by the intending lessee of a certain premium within a specified time has been held not to be conditional on the payment being made within that time, the real object of the stipulation being to provide the amount of the premium, and not the time of its payment (*n*). But a stipulation that time shall be regarded as of the essence of the contract may be implied, either from the nature of the subject-matter of the agreement, *e.g.*, in agreements to let mines or other works for commercial enterprise (*o*), or from the character of the contracting parties, *e.g.*, where the proposed lessors are an ecclesiastical corporation and the members of it entitled to participate in the consideration money may have changed in consequence of the delay which has taken place (*p*).

It is also to be noticed that even where time is not of the essence of the contract, if one party has been guilty of delay, the other may call upon him to fulfil the agreement within a reasonable time (*q*); and any subsequent delay after such notice will defeat a claim to specific performance, whether made by the lessor (*r*) or by the lessee (*s*), unless capable of satisfactory explanation (*t*). Hence, though an agreement to let for a specified term, with a stipulation to grant a lease at the tenant's request for a further specified term at the same rent, may be specifically enforced at the instance of the lessee at any time after the expiration of the first term (*u*), so long as he has continued in possession with the sanction of the lessor (*x*), the latter may call upon him to decide if he will take the lease, and any delay on the part of the lessee after receiving such notice will be fatal (*y*).

(*m*) Fry, p. 465.

(*n*) *Hearne v. Tenant*, 13 Ves. 287.

(*o*) *Parker v. Frith*, 1 S. & S. 199, n.;
Macbryde v. Weekes, 22 Beav. 533;
Walker v. Jeffreys, 1 Hare, at p. 348, per
Wigram, V.-C.

(*p*) *Carter v. Dean of Ely*, 7 Sim. 211.

(*q*) Cp. as to this, p. 313, *ante*.

(*r*) *Heaphy v. Hill*, 2 S. & S. 29;
Macbryde v. Weekes, *supra*.

(*s*) *Walker v. Jeffreys*, *supra*; *Chester-*
man v. Mann, 9 Hare, 206; *Huzham v.*

Llewellyn, 21 W. R. 570; *Sharp v.*
Wright, 28 Beav. 150.

(*t*) *Huzham v. Llewellyn*, 21 W. R.
766.

(*u*) *Moss v. Barton*, L. R. 1 Eq. 474,
where acts had even been done by the
lessee to a certain extent inconsistent
with his right to a lease.

(*x*) *Buckland v. Papillon*, L. R. 2 Ch.
67.

(*y*) *Hershey v. Giblett*, 18 Beav. 174,
per Lord Romilly, M. R.

Moreover, even though time be not of the essence of the contract, a long delay in enforcing it will debar from relief, by constituting laches: for specific performance is a remedy which the Court will not give, except in cases where the parties seeking it come promptly, and as soon as the nature of the case will permit (*a*). This doctrine, however, does not apply, as against the lessor, where the agreement has been executed by possession being given and rent paid (*a*), for both parties are then, from the time of the agreement, in possession of the benefits thereby given to them (*b*). But the rule—though it has been relaxed on this ground at the instance of the lessee where (save that the lease has remained unexecuted) he has performed the agreement in all respects (*c*), or in all respects except where performance has been rendered impossible by the default of the lessor (*d*),—will at all events be enforced if in consequence of the delay the lessee has remained free from the burden of the covenants which the lease would have contained (*e*). The mere fact, however, of payment of rent by the lessee during the whole time of possession is not, as it seems, sufficient to cause a relaxation of the rule in his favour (*f*).

Like most of the other grounds of defence to specific performance, any delay on the part of the plaintiff which would deprive him of that relief where time is of the essence of the contract may be waived by acts on the part of the defendant (*e.g.*, accepting rent), which show that, with knowledge of the circumstances, he has treated the agreement as in force (*g*).

11. *Implied rescission*.—If an agreement for a lease has been subsequently rescinded, specific performance of it is naturally not to be obtained (*h*). And rescission or waiver, though given effect to only if the evidence of it be clear (*i*), may be implied from the acts of the parties (*k*). Thus, where a tenant under an agreement for a lease entered into an arrangement with his lessor that the latter should accept another person as tenant in his place (he guaranteeing the rent), and that other person occupied and paid rent under the new arrangement, it was held that the lessor could

(*a*) *Eads v. Williams*, 4 D. M. & G. 674, per Lord Cranworth, L. C.

(*a*) *Sharp v. Milligan*, 22 Beav. 606; *Shepherd v. Walker*, L. R. 20 Eq. 659.

(*b*) *Clarke v. Moore*, 1 Jon. & L. 723.

(*c*) *Burke v. Smyth*, 3 Jon. & L. 193.

(*d*) *Reddin v. Jarman*, 16 L. T. 449.

(*e*) *Davenport v. Walker*, 34 L. T. 168.

(*f*) *Powis v. Lord Dynevor*, 35 L. T. 940.

(*g*) *Hudson v. Bartram*, 3 Madd. 440.

(*h*) *Fry*, pt. 3, c. 24.

(*i*) *Carolan v. Brabazon*, 3 Jon. & L. 200.

(*k*) See *Chubb v. Fuller*, 4 Jur. N. S. 153.

not afterwards obtain specific performance of the original agreement (*l*). But if the substituted agreement be one made without consideration this will be otherwise (*m*).

12. *Uselessness of decree.*

(a) From lapse of time.—Specific performance will not be ordered of an agreement to grant a lease when the term has already expired (*n*),—even if the agreement contain an option to the lessee for a further term (*o*),—though a decree for an account of arrears of rent on the footing of the agreement may be made in the action (*p*); for what the Court really would be decreeing in such a case would not be the specific performance of an agreement for a lease, but merely that the lessee should make himself a specialty debtor in respect of past benefits received (*q*).

On a somewhat similar ground, specific performance has been refused of an agreement to let from year to year, the remedy in damages (*r*) being considered adequate (*s*). But this rule was held not to apply where that relief was held to be necessary (*t*) in order that the party claiming it should enjoy his full legal rights (*u*). And it has been said that, although specific performance is a discretionary remedy, it will be granted “even in the case of a very short term” if the circumstances require it (*x*).

(b) From the nature of the agreement.—It is a well-established rule that the Court will not decree specific performance of an agreement the performance of which it cannot enforce (*y*). To an undertaking, for instance, to repair (*z*), or to build (*a*), that remedy is inapplicable, except (in the latter case) where the contract is in its nature defined (*b*). Consequently, if the agreement for a lease

(l) *Moore v. Marrable*, L. R. 1 Ch. 217.

(m) *Robson v. Collins*, 7 Ves. 130.

(n) *De Brassac v. Martyn*, 11 W. R. 1020; *Turner v. Clowes*, 20 L. T. 214 (reported as *Turnor v. Clowes*, 17 W. R. 274).

(o) *Nesbitt v. Meyer*, 1 Swanst. 223.

(p) *Wilkinson v. Torkington*, 2 Y. & C. Ex. 726.

(q) *Walters v. Northern Coal Co.*, 5 D. M. & G. 629, per Lord Cranworth, L. C.

(r) *Infra*, p. 386.

(s) *Clayton v. Illingworth*, 10 Hare, 451.

(t) See note on next-cited case at p. 15, *ante*.

(u) *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608. The tenant, moreover, in this case had executed the demise under seal.

(x) *Lever v. Koffler*, [1901] 1 Ch. 543, per Byrne, J.

(y) Fry, p. 41.

(z) *Ante*, p. 228.

(a) Fry, *ubi sup*.

(b) *Mosely v. Virgin*, 3 Ves. 184; *Cubitt v. Smith*, 11 L. T. 298; *London (City of) v. Nash*, 3 Atk. 512; Fry, p. 43. See the principles explained in some detail in *Wolverhampton (Mayor, &c., of) v. Emmons*, [1901] 1 Q. B. 515 (a case of sale); and see also *Molyneux v. Richard*, [1906] 1 Ch. 34.

forms, with an agreement of the above description, part of an entire contract, of which the component parts cannot be separated from one another, that relief will be refused; thus, it has been refused at the instance of the intended lessees in the case of an agreement to let a wharf which was to be subject to the employment by them of the intended lessor in the works to be carried on (c). For this, however, the unenforceable clause must be a material part of the contract (d). Thus, specific performance has been decreed, at the suit of the lessee, of an agreement to grant a lease with certain repairs and improvements to be done by the lessor: for these are mere incidents of the agreement not affecting its substance, and, though the decree cannot be made to extend to them, may be made the subject of damages (e). And if the portion of the agreement which the Court cannot perform can be separated from the portion which deals with the grant and acceptance of a lease, specific performance of the latter may be had (f). A building agreement, in which the landlord undertakes to grant separate leases of different plots of ground when the buildings on each plot reach a certain stage, is not an entire contract within the meaning of the general rule, because a separate execution is contemplated; so that the mere fact that it has remained unperformed with regard to some of the plots affords no answer to an action for specific performance in respect of others (g).

In compliance with the above rule, specific performance has been refused, at the instance of the lessor, of an agreement for a lease, subject to a condition that the intending lessee should build a house of not less than a specified value according to plans to be approved by the lessor (h). But the rule is now subject to an important qualification: for since the passing of the statute 21 & 22 Vict. c. 27 (i), where the portion of the agreement which cannot be enforced is a condition inserted for the plaintiff's benefit in respect of which the defendant is in default, the former may waive such benefit (k), even if only at the trial of the action (l); and the Court may thereupon grant specific performance of the one part

(c) *Ogden v. Fossick*, 4 D. F. & J. 426; followed in *Frith v. Frith*, [1906] A. C. 254.

(d) *Asylum for Female Orphans v. Waterlow*, 16 W. R. 1102, per Lord Romilly, M. R.

(e) *Middleton v. Greenwood*, 2 D. J. & S. 142.

(f) *Kay v. Johnson*, 2 H. & M. 118.

(g) *Wilkinson v. Clements*, L. R. 8 Ch. 96; *Lowther v. Heaver*, 41 Ch. Div. 248.

(h) *Brace v. Wehnert*, 25 Beav. 348.

(i) As to this statute, see *infra*, pp. 387, 388.

(k) *Fry*, p. 366.

(l) *Mayor of London v. Southgate*, 38 L. J. Ch. 141.

(the agreement for a lease), and damages under the above statute as to the other. This has been done, for instance, at the suit of the lessor where the agreement was to grant a lease upon an old building being pulled down and a new one erected by the lessee (*m*). But where it was a substantial part of the agreement that such repairs should be executed as the two parties should jointly agree upon, and the intended lessee, in lieu of waiving, insisted on his right to have such repairs done as the Court should order, specific performance at his instance was refused (*n*); though on his waiving that part of the agreement he subsequently obtained such relief, with regard to the decree for a lease, on possession and expenditure under the agreement being shown by him (*o*).

(c) From acts of the intending lessee.—The fact that the intending lessee has clearly committed acts which would, if the lease had been granted, have entitled the lessor to determine it by re-entry for forfeiture (*p*)—and even that irrespective of that right gross breaches of covenant, *e.g.*, acts of waste, have been committed (*q*) which could not be compensated by damages (*r*)—will afford a good ground for refusing him specific performance; for it would be idle for the Court to create a legal relation, which, if created, would be immediately dissoluble (*s*). This applies, for example, to breaches of the covenant to repair (*t*), or to insure (*u*), or not to carry on trade (*x*), or to cultivate lands in a proper manner (*y*). Nor does the Conveyancing Act (*z*), though it provides a means by which relief against forfeiture may be given for certain breaches of covenant when once the lease has been granted (*a*), make any difference in this respect (*b*); though if the agreement be one of which the tenant is entitled, independently of the Act, to specific performance,

(*m*) *Soames v. Edge*, Johns. 669.

(*n*) *Norris v. Jackson*, 1 J. & H. 319.

(*o*) *S. C.*, 3 Giff. 396.

(*p*) See *ante*, pp. 316 *et seq.*

(*q*) *Gourlay v. Duke of Somerset*, 1 V. & B. 68.

(*r*) *Hare v. Burges*, 5 W. R. 585, per Lord Cranworth, L. C.

(*s*) *Gregory v. Wilson*, 9 Hare, 683, per Wigram, V.-C.

(*t*) *Id.*; *Hill v. Barclay*, 18 Ves. 56; *Porrett v. Barnes*, 2 L. J. (O. S.) Ch. 142; *Swain v. Ayres*, 21 Q. B. Div. 289. In *Nunn v. Truscott*, 3 De G. & S. 304, the relief seems to have been refused, even in the absence of a clause of re-entry,

on the mere ground that the defendant had entered into the agreement in expectation that the plaintiff would keep the premises in repair.

(*u*) *Reynolds v. Pitt*, 19 Ves. 134; *Thompson v. Guyon*, 5 Sim. 65; *Gregory v. Wilson*, *supra*.

(*x*) *Lewis v. Bond*, 18 Beav. 85.

(*y*) *Coatsworth v. Johnson*, 55 L. J. Q. B. 220.

(*z*) 44 & 45 Vict. c. 41.

(*a*) Sect. 14; *post*, p. 657.

(*b*) See *Coatsworth v. Johnson*, *supra*; *Swain v. Ayres*, *supra*. As to the effect of 55 & 56 Vict. c. 13, s. 5, see *post*, p. 667.

the latter relief may still be given, but only on the footing of compensation being first made according to the statute (c).

The acts in question, however, for specific performance to be refused, must be gross and wilful (d); but they will be so regarded if not attributable to mistake or accident, or if persisted in (e). And though they may be waived (f), the receipt of rent with knowledge of their having been committed will not defeat this defence if the breach of covenant giving rise to the forfeiture be one of a continuous nature (g). But the mere fact that the act in question, though not a breach of covenant, is a nuisance to the lessor will not entitle him to resist specific performance on this ground (h).

Formerly, where the evidence as to the commission of breaches of covenant was conflicting, so as not to make it clear that the relief should be refused altogether, courts of equity adopted the expedient of granting specific performance and reserving liberty to the lessor to bring an action at law in respect of the alleged breaches (i); and to this end they directed the lease to bear some date (usually that of the agreement) before that of the alleged breaches, and required the lessee to give an undertaking to admit in any such action at law that the lease was actually executed on the date it bore (k). But now that every kind of relief can be given by the Court before which the matter is brought (l), this course seems to be no longer necessary.

Execution of lease.—When a decree of specific performance has been made, it may be enforced, if the defendant should refuse to execute the lease, by attachment (m); or the Court may direct (n) that the lease be executed by the plaintiff, or it may (o), on such terms and conditions (if any) as may be just, order the execution of the lease by such person as it may nominate for that purpose, the execution operating for all purposes as if it had been effected by the person originally directed to effect it.

(c) *Strong v. Stringer*, 61 L. T. 470.

(d) *Parker v. Tarwell*, 2 De G. & J. 559; *Rankin v. Lay*, 2 D. F. & J. 65.

(e) *Gregory v. Wilson*, *ubi sup.*

(f) *Rogers v. Tudor*, 6 Jur. N. S. 692; *Walker v. Jeffreys*, 1 Hare, at p. 353, per Wigram, V.-C.; *Hall v. Eve*, 4 Ch. Div. 341.

(g) *Gregory v. Wilson*, *supra*. See *post*, p. 653.

(h) *Gorton v. Smart*, 1 S. & S. 66.

(i) See *Jones v. Jones*, 12 Vca. 186.

(k) *Pain v. Coombs*, 1 De G. & J. 34; *Lillie v. Legh*, 3 De G. & J. 204; *Rankin v. Lay*, 2 D. F. & J. 65; *Poynts v. Fortune*, 27 Beav. 393.

(l) Jud. Act, 1873, s. 24.

(m) *Grace v. Baynton*, 25 W. R. 506; R. S. C. 1883, O. 42, r. 7.

(n) O. 42, r. 30.

(o) 47 & 48 Vict. c. 61 (Jud. Act, 1884), s. 14.

When the lease has once been executed, the agreement may under special circumstances—*e.g.*, where it contains stipulations as to collateral matters upon which the lease is silent (*p*), or where it provides that the lease is to be in a form it sets forth, so that the two instruments are clearly connected together (*q*)—be referred to for the purpose of controlling the lease. But in general the rule is clear, that when a preliminary contract is afterwards reduced into a deed, and any difference is found between them, the mere written contract is entirely governed by the deed, and cannot therefore be looked at (except as to matters outside the deed, in cases where the latter covers only a portion of the ground covered by the contract) in order to control the rights of the parties under the deed (*r*). And either party will be justified in refusing to execute a lease tendered by the other in which the real consideration as disclosed by the agreement is misstated in a material particular (*s*).

It follows that the question what clauses the lease should contain is one of great importance (*t*).

Usual covenants.—If any special covenants are to be inserted in the lease they must be found within the agreement, for in their absence no other than “usual” covenants will be allowed, whether the agreement contain a stipulation for usual covenants (*u*) or not (*x*). So a person who agrees to take an underlease has, in the absence of actual notice (*y*), constructive notice only of “usual” covenants in the head lease (*z*), unless he has had an opportunity of inspecting, or otherwise acquainting himself with, the provisions of that lease (*a*); and the same rule applies to an agreement to take an assignment of an existing lease (*b*).

(*p*) *Morgan v. Griffith*, L. R. 6 Ex. 70; *Erskine v. Adeane*, L. R. 8 Ch. 756. Cf. *infra*, p. 390.

(*q*) *Salaman v. Glover*, L. R. 20 Eq. 444.

(*r*) See *Palmer v. Johnson*, 13 Q. B. Div. 351; *Saunders v. Cockrill*, 87 L. T. 30.

(*s*) *Vonhollen v. Knowles*, 12 M. & W. 602.

(*t*) A difference thereon between lessor and lessee, so long as the question is not one affecting the existence or validity of the contract, may be disposed of by summons in chambers of the Chancery Division (87 & 88 Vict. c. 78, s. 9). See, *e.g.*, *In re Lander*, [1892] 3 Ch. 41.

(*u*) Cases under this head, *passim*.

(*x*) *Church v. Brown*, 15 Ves. 258; *Proper v. Parker*, 3 My. & K. 280; *In re Lander*, [1892] 3 Ch. 41.

(*y*) *Brooks v. Tolputt*, 1 T. L. R. 39.

(*z*) *Flight v. Barton*, 3 My. & K. 282. As to constructive notice as against the head lessor, see *post*, p. 426.

(*a*) *Hyde v. Warden*, 3 Ex. Div. 72; *Cosser v. Collinge*, 3 My. & K. 283; *Nash v. Cochran*, 3 Jur. 973. Cf. *Porter v. Drew*, 5 C. P. D. 143.

(*b*) *Reeve v. Berridge*, 20 Q. B. Div. 523; *Midgley v. Smith*, W. N. 1893, p. 120; *Molyneux v. Hawtrey*, [1903] 2 K. B. 487. Cp. 45 & 46 Vict. c. 39, s. 3. This rule applies to sales by auction (*In re White*, [1896] 1 Ch. 637), and is not even excluded by an express stipulation that the vendor's title is accepted by the purchaser: *In re Haedicke*, [1901] 2 Ch. 666.

An agreement for a lease to contain all usual covenants, and particularly those under which the premises are held, "so that the same in no way restricts" a specified trade, does not amount to an undertaking that the original lease does not contain such a restrictive covenant, but only that if it does the lease agreed for should not contain it (*c*).

Certain covenants to be presently mentioned have now been firmly settled by law not to fall within this designation; but inasmuch as usual covenants may vary in different generations (*d*), and inasmuch as the question, as will be presently explained, has sometimes to be decided with reference to considerations of locality and custom, its determination has in some cases been left as one of fact to a jury (*e*).

The only covenants which are always considered "usual" are (*f*)—on the part of the lessor, the limited covenant for quiet enjoyment (*g*), and on the part of the lessee, those to pay rent (*h*) and tenant's taxes (*i*) (and probably landlord's taxes (*k*) also if the agreement be to pay a "net" rent (*l*)), and to keep and yield up the premises in repair (*m*) and allow the lessor to enter and view them with reference to that covenant (*n*); but the exception in the event of fire frequently contained in the covenant to repair (*o*) is not "usual" so as to entitle the lessee to have it inserted in the lease (*p*). Nor—apart from local custom (*q*)—is a provision in a mining lease to the effect that, when the property is incapable of being worked at a profit (*r*), the lessee should have the right to determine the lease (*s*). And though an implied covenant (*t*), *e.g.*, to treat agricultural land in a husbandlike manner, is a "usual" covenant in this sense, that its presence will not entitle a person who has agreed to take from a lessee, whether by underlease (*u*),

(*c*) *Hayward v. Parke*, 16 C. B. 295.

(*d*) *Hampshire v. Wickens*, 7 Ch. D. 555, per Jessel, M. R.

(*e*) *Bennett v. Womack*, 7 B. & C. 627; *Brookes v. Drysdale*, 3 C. P. D. 52 (see note (*l*), *infra*, as to these two cases); *Doe v. Sandham*, 1 T. R. 705 (lease under a power).

(*f*) *Dav. Prec. Conv.* vol. 5, pt. 1, p. 53 (3rd ed.), cited in *Hampshire v. Wickens*, *supra*, per Jessel, M. R.

(*g*) *Ante*, p. 297.

(*h*) *Ante*, p. 154.

(*i*) *Ante*, p. 209.

(*k*) Except property tax and tithe rent-charge; *ante*, p. 183.

(*l*) *Bennett v. Womack*, *supra*. (This,

however, was a case of assignment: see per Bayley, J.)

(*m*) *Ante*, p. 216.

(*n*) *Ante*, p. 236.

(*o*) *Ante*, p. 222.

(*p*) *Sharp v. Milligan*, 23 Beav. 419; *S. C.* (reported as *Thorpe v. Milligan*) 5 W. R. 336. And where the lessor agrees to its insertion the lessee cannot extend its scope by adding to the word "fire" the words "or other casualty": *Crosse v. Morgan*, 60 L. T. 703.

(*q*) See next paragraph.

(*r*) *Ante*, pp. 295-6.

(*s*) *Strelley v. Pearson*, 15 Ch. D. 113.

(*t*) *Ante*, pp. 149-153.

(*u*) *Hyde v. Warden*, 3 Ex. Div. 72.

or by assignment (*x*)—and who, as has been seen (*y*), is bound without notice by the usual covenants of the lease—to object to the title on that ground (*z*), it is not of course a “usual” covenant in the sense now considered.

But the introduction into the lease of other than the foregoing covenants as “usual” may be justified by reason of special circumstances (*a*), *i.e.*, those peculiar to a particular trade (*b*)—for instance, that of an hotel (*c*)—to which the agreement may relate. (A covenant, however, in the lease of a public-house for the lessee to reside on the premises and personally conduct the business has been held not to be usual (*d*).) Regard in that case may be had to the peculiar nature of the property; but the above result can only be established by evidence (*e*), and is not to be adopted from a mere view entertained by the Court (*f*). Similarly, the custom of the district or neighbourhood where the premises are situated may also be taken into consideration, so far as it may contribute to the same result (*g*).

Covenants in restraint of trade (*h*) are not “usual” (*i*)—*i.e.*, against carrying on either trade generally (*i*) (and *à fortiori* in a trading district (*k*)), or particular trades (*l*), even if only without the consent of the lessor or a third party (*m*); but a proviso for re-entry (*n*) if any but a specified trade be carried on has been held usual by regard to the considerations of local custom and nature of property already mentioned (*o*).

The covenant not to assign or underlet without licence (*p*) is now—after some decisions to the contrary (*q*)—quite settled *not* to be a usual covenant (*r*), and *à fortiori* if the agreement expressly refer to covenants to be observed by the lessee and his

(*x*) *Reeve v. Berridge*, 20 Q. B. Div. 523.

(*y*) *Supra*, p. 383.

(*z*) *Hyde v. Warden*, *supra* (covenant not to mow meadow land more than once a year).

(*a*) *Dev. Prec. Conv.*, *ubi sup.*

(*b*) *Hampshire v. Wickens*, *supra*, per Jessel, M. R.

(*c*) *Haines v. Burnett*, 27 Beav. 500.

(*d*) *In re Lander*, [1892] 3 Ch. 41.

(*e*) As in *Bennett v. Womack*, 7 B. & C. 627.

(*f*) *Hampshire v. Wickens*, *ubi sup.*, disapproving *Haines v. Burnett*, *supra*, on this ground.

(*g*) *Boardman v. Mostyn*, 6 Ves. 467; *Bell v. Barchard*, 16 Beav. 8; *Wilbraham v. Livesey*, 18 Beav. 206; *Parish v. Sleeman*, 1 D. F. & J. 326; *Bennett v.*

Womack, *supra*; *Strelley v. Pearson*, *supra*.

(*h*) *Ante*, pp. 243 *et seq.*

(*i*) *Van v. Corpe*, 3 My. & K. 269.

(*k*) *Wilbraham v. Livesey*, *supra*.

(*l*) *Reeve v. Berridge*, *supra*.

(*m*) *Proper v. Parker*, 3 My. & K. 280.

(*n*) As to this in general in these cases, *see infra*.

(*o*) *Bennett v. Womack*, *supra* (case of public-house). See note (*l*), p. 384, *supra*.

(*p*) *Ante*, p. 269.

(*q*) *Morgan v. Slaughter*, 1 Esp. 8; *Folkingham v. Croft*, 3 Aust. 700.

(*r*) *Henderson v. Hay*, 3 Bro. C. C. 632; *Church v. Brown*, 15 Ves. 258; *Browne v. Raban*, *id.*, 528; *Hodgkinson v. Crowe*, L. R. 19 Eq. 591.

assigns (s). Nor does it make any difference that such licence is not to be unreasonably withheld (t),—even in the case of the lease of a public-house (u)—or that the agreement specially stipulates for all usual covenants “to protect the interest of the lessor” (x).

It is likewise established that the lessor will not be entitled to have a proviso for re-entry (y) inserted in the lease for the breach of any covenant except that to pay rent (z); nor has the Conveyancing Act, which provides measures of relief on the commission of breaches (a), made any alteration in this respect (b). And the rule is not different in the case of the lease of a public-house (c). A clause of re-entry, for instance, on the bankruptcy of the lessee (d), or on his suffering an execution (e), is not a “usual” clause within the general rule: except perhaps by reference to the nature of the subject-matter of the demise (f), or where it is specially stipulated that the lease is to contain clauses “usually inserted in leases of property of a similar description” (f).

Sometimes the agreement stipulates for “proper” covenants. This means, not necessarily those that are reasonable, but those that are calculated to secure the full effect of the contract (g). Hence, where an agreement was made to grant a lease of a public-house “with all proper clauses” to a brewer, it was held that a clause against underletting (h) was not a proper clause, inasmuch as the contract would not in this way effect the intention of the lessee, which was clearly not that of going into the trade of a publican (i).

ACTION FOR DAMAGES.

(a) **Damages in action for specific performance.**—Apart from the question of specific performance, an agreement to grant or accept a lease, like any other agreement, can, if the letting be not

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|---|---|
| (s) <i>Vere v. Loveden</i> , 12 Ves. 179. | (c) <i>In re Lander</i> , <i>supra</i> . |
| (t) <i>Hampshire v. Wickens</i> , 7 Ch. D. 555; <i>Bishop v. Taylor</i> , 60 L. J. Q. B. 556; <i>ante</i> , p. 271. | (d) <i>Hodgkinson v. Crowe</i> , L. R. 19 Eq. 591. See <i>ante</i> , p. 319. |
| (u) <i>In re Lander</i> , [1892] 3 Ch. 41. | (e) <i>Hyde v. Warden</i> , 3 Ex. Div. 72. |
| (x) <i>Buckland v. Papillon</i> , L. R. 1 Eq. 477; <i>affd.</i> , L. R. 2 Ch. 67. | (f) <i>Haines v. Burnett</i> , 27 Bear. 500 (case of an hotel). As to this case, see note (f), p. 385, <i>supra</i> . |
| (y) As to this, see <i>ante</i> , p. 316. | (g) <i>Jones v. Jones</i> , 12 Ves. 186, per Grant, M. R. |
| (z) <i>Hodgkinson v. Crowe</i> , L. R. 10 Ch. 622. | (h) See at note (r), <i>supra</i> . |
| (a) See <i>post</i> , p. 657. | (i) <i>Eadie v. Addison</i> , 52 L. J. Ch. 80. |
| (b) <i>In re Anderton</i> , 45 Ch. D. 476. | |

for an illegal purpose (*k*), be enforced by an action for damages (*l*). Thus upon default or refusal (apart from questions of title (*m*)) by the lessor to carry out such agreement, the lessee may recover for loss which he may have sustained in consequence (*n*). So damages can be recovered for breach of an agreement (founded on proper consideration) to enter into an agreement to accept a lease from a third party on such terms as the latter may approve (*o*).

Formerly, by statute (*p*) damages could be given in the action for specific performance itself "in addition to or in substitution for" that relief: a condition which was interpreted to mean that the Court could in its discretion grant relief by way of damages in an action brought for specific performance, but only where it was within its power to grant the latter relief—or where, if not within its power, the proposed lessee had a right to a lien on the lessor's interest for moneys expended by him on the premises (*q*),—and not where no agreement was established of which specific performance could be given at all (*r*). Nor could damages under the Act have been given in any case where they could not previously have been obtained at common law (*s*). This enactment, however, is now repealed (*t*), its provisions having been displaced by the larger powers to the same effect given by the Judicature Act (*u*), under which the Court is able to give damages even if there be no title to specific performance of the whole or any part of the agreement (*x*). But it still cannot give them in any case in which, before the Judicature Act, damages were not recoverable (*y*), *e.g.*, in the case of an oral agreement for a lease which was not capable of specific performance in equity, and in respect of which, in an action at law for damages, the defendant could have successfully

(*k*) *Cowan v. Milbourn*, L. R. 2 Ex. 230.

(*l*) The writ may be indorsed, *e.g.*, as follows: "The plaintiff's claim is for damages for breach of a contract to let [or take] a house": R. S. C. 1883, App. A., Pt. III., s. 4.

(*m*) See as to this, *infra*, p. 388.

(*n*) *Ward v. Smith*, 11 Price, 19; *Jaques v. Millar*, 6 Ch. D. 153 (where specific performance was also decreed. The decision itself has been overruled on another point: see *ante*, p. 357).

(*o*) *Foster v. Wheeler*, 38 Ch. Div. 130.

(*p*) 21 & 22 Vict. c. 27, s. 2. This statute is generally called Cairns's Act.

(*q*) *Middleton v. Magnay*, 2 H. & M. 233.

(*r*) *Lewers v. Shaftesbury (Lord)*, L. R. 2 Eq. 270.

(*s*) *Rock Portland Co. v. Wilson*, 52 L. J. Ch. 214. See note (*b*), *infra*.

(*t*) By 46 & 47 Vict. c. 49, s. 3. But as to the effect of the "saving clause" in preserving the jurisdiction under the Act, see *Sayers v. Collyer*, 28 Ch. Div. 103; *In re R.*, [1906] 1 Ch. 730.

(*u*) 36 & 37 Vict. c. 66, s. 24.

(*x*) Per Kay, J., in *Elmore v. Pirrie*, 57 L. T. 333. The cases, however, are by no means all in harmony with this statement of the law. See the matter discussed in 2 Wh. & Tud. L. C., pp. 448—453 (7th ed.), notes to *Cuddee v. Rutter*.

(*y*) Per Chitty, J., in next-cited case.

pleaded the Statute of Frauds (*z*). So the equitable doctrine of part performance (*a*), which could not formerly have been made use of for the purpose of obtaining damages on a contract at law, does not enable the Court to award damages on a parol contract under the Judicature Acts (*b*).

Damages may, under the present practice, be claimed, in an action for specific performance, in the alternative; and where this was done in an action for breach of agreement to take a lease, and the plaintiff before trial re-let the premises (specific performance being thus by his own act rendered impossible), it was held that an application by him to amend the pleadings by limiting the claim to one for damages should be entertained only on the terms of the defendant being treated as in the same position as if the action had been brought in the common law Division for damages only (*c*).

(*b*) **Against lessor—Defect of title.**—An agreement to grant a lease implies, as already stated (*d*), that the proposed lessor has a good title to let, for an agreement for a lease means an agreement for a valid lease (*e*). Nor do the statutory provisions restricting the intending lessee's right to call for the title to the reversion (*f*) absolve the lessor from the duty of disclosing to him any defect in his title (*g*). Consequently, if the lessor's title prove defective, the proposed lessee may bring an action against him for damages (*h*), in which action he may recover any premiums or deposit he may have paid (*i*), even though he may have entered and occupied under the agreement (*k*). But if the lessor has acted in good faith, the plaintiff in such action can only recover whatever money has been paid by him (or for which he may have properly incurred a liability (*l*)), with interest and expenses (*m*). So where an agreement, containing an option of purchase to the lessee, expressly gave him liberty to make, at his own expense, such improvements

(*s*) *In re Northumberland Avenue Hotel Co.*, 54 L. T. 76; *affd.*, 33 Ch. Div. 16.

(*a*) *Supra*, p. 360.

(*b*) *Lavery v. Pursell*, 39 Ch. D. 508; Fry, Sp. Perf. pp. 255-6 (4th ed.). It seems possible that this principle should be restricted to the case where the contract is incapable of specific performance.

(*c*) *Nicholson v. Brown*, W. N. 1897, p. 52.

(*d*) *Ante*, p. 143.

(*e*) *Gwillim v. Stone*, 3 Taunt. 433, per Mansfield, C. J.

(*f*) *Supra*, p. 347.

(*g*) *Cresswell v. Davidson*, 56 L. T. 811, per Kay, J.

(*h*) *Stranks v. St. John*, L. R. 2 Q. P. 376; *Norton v. Herron*, Ry. & M. 229.

(*i*) *Roper v. Coombes*, 6 B. & C. 534.

(*k*) *Wright v. Colls*, 8 C. B. 150.

(*l*) See *Richardson v. Chasen*, 10 Q. B. 756.

(*m*) *Bain v. Fothergill*, L. R. 7 H. L. 158 (the principle of which applies to leases: *Gas Light, &c., Co. v. Towne*, 35 Ch. D. 519); *Hanslip v. Padwick*, 5 Exch. 615.

to the premises as he thought fit, and after laying out money on them he gave notice of his intention to purchase: it was held, on the lessor failing to make out the title he represented himself to have had, that the lessee could not recover as damages the amount he had expended on the improvements (*n*). On the other hand, if the lessor has entered into the agreement with full knowledge that he has no title, nor any means of acquiring it, the plaintiff may recover from him in addition damages resulting from the loss of his bargain (*o*). These, however, can be recovered only as damages for deceit, and not as damages for breach of the contract (*p*), and consequently, if the lessee seek to obtain them, misrepresentation (*q*) must be alleged and proved (*r*). And inasmuch as every vendor is bound by his contract to do all that he can to complete the conveyance (*s*), the case of a vendor or lessor who can make good title but will not do so, or will not do what he can and ought to do in order to obtain one, is not within the above rule limiting the damages recoverable against him (*t*). On the other hand, where the tenant for life of a settled estate entered into an agreement (containing no provision as to title) to let a portion of it, for the letting of which the consent of the trustees was necessary (*u*), without such consent being obtained, and died without being required to execute a lease, whereupon the lessees were evicted by the remainderman, it was held that they were not entitled to damages against her personal representative (*x*).

Similarly, any sums which the proposed lessee may have expended with the lessor's consent in improvements on the premises will be recoverable by him if he be prevented from taking possession through the lessor's default (*y*), and this even if the agreement be one which is insufficient to satisfy the Statute

(*n*) *Worthington v. Warrington*, 8 C. B. 134.

(*o*) *Robinson v. Harman*, 1 Exch. 850.

(*p*) *Bain v. Fothergill*, *supra*, per Lord Chelmsford.

(*q*) As to the necessary ingredients of fraud or misrepresentation, see *Derry v. Peck*, 14 App. Cas. 337.

(*r*) *Rock Portland Co. v. Wilson*, 52 L. J. Ch. 214. The cases on this subject with regard to sales will be found in *Mayne on Damages*, pp. 214 *et seq.* (7th ed.). Cp. also *Richardson v. Silvester*, L. R. 9 Q. B. 34, where an action of deceit was held to lie upon an offer to let contained in an advertisement.

(*s*) *Bain v. Fothergill*, *supra*, per Lord Hatherley.

(*t*) *Day v. Singleton*, [1899] 2 Ch. 320.

(*u*) See *ante*, p. 30.

(*x*) *Pease v. Courtney*, [1904] 2 Ch. 503. It is pointed out in the judgment that it did not appear that the trustees' consent could have been obtained even if applied for, in which case the lessees could not have recovered more than their costs of investigating the title. But though no such costs seem to have been incurred, it is submitted that the costs of the agreement and any other expenses of the lessees were properly recoverable by them, and that the statement that there had been no breach of the agreement on the part of the lessor can scarcely be regarded as correct.

(*y*) *Pulbrook v. Lawes*, 1 Q. B. D. 281.

of Frauds (z). And where a party who has agreed to grant a lease at a future date puts it out of his power to do so by granting an inconsistent lease to another person, the intended lessee may sue for damages without waiting till that date arrives (a).

If, however, the defect in the lessor's title is one which could have been ascertained by the intended lessee, the latter will not, in the absence of an express stipulation for compensation, be entitled, after taking the lease (containing the usual *qualified* covenant for quiet enjoyment (b)), to recover damages in consequence of the lessor being unable to grant the full term provided by the agreement (c). On the other hand, if there be a clause for compensation, the mere fact that the lease has been executed will not prevent the lessee from claiming it (d).

(c) **Against lessee—Conditions precedent.**—In an action for breach of agreement to accept a lease a defence is frequently raised on the part of the lessee that a certain stipulation *dehors* the agreement (e.g., an undertaking to make the premises fit for habitation) has remained unperformed by the lessor; and sometimes such non-performance is made by the lessee the ground of an independent action for damages for breach of the agreement for a lease (e). It is, however, a general rule that parol evidence cannot be given to vary a written agreement (f); hence if the written agreement be intended to be a record of all the terms of the transaction, such evidence cannot be given (g). But where the stipulation set up relates to a collateral matter, the written agreement does *not* contain all the terms (h); and consequently, if such stipulation is not inconsistent with the written agreement, and does not, as one relating to an interest in land, fall within the Statute of Frauds, it may be relied upon by the tenant (i). Thus a verbal agreement by the lessor to keep down game may be set up by the lessee where the lease, which he has executed upon the

(s) *Pulbrook v. Lawes*, *supra*, disproving *Hodgson v. Johnson*, E. B. & E. 685.

(a) *Ford v. Tiley*, 6 B. & C. 325.

(b) *Ante*, p. 297.

(c) *Bealey v. Bealey*, 9 Ch. D. 103; *Clayton v. Leech*, 41 Ch. Div. 103.

(d) See *Palmer v. Johnson*, 13 Q. B. Div. 351.

(e) See *ante*, p. 146.

(f) Attempts, for instance, have accordingly failed to show that payment

of rent should differ in amount (*Preston v. Merceau*, 2 W. Bl. 1249; and *op. Hilton v. Goodhind*, 2 C. & P. 591), or in the time from which it should begin to run (*Henson v. Coope*, 3 Sc. N. R. 48), from that mentioned in the agreement.

(g) *Angell v. Duke*, 32 L. T. 320.

(h) *Id.*, per Blackburn, J., who, however, seems to have disapproved of the next-cited case.

(i) *Mann v. Nunn*, 43 L. J. C. P. 241. *Cp. Seago v. Deane*, 4 Bing. 459.

faith of it, is silent on the subject (*k*); for such an agreement (it has been said) does not vary the agreement for tenancy, but creates a mere personal contract entirely independent of the tenancy and of any contract affecting the land (*l*). This principle, as has been already pointed out (*m*), applies equally to a warranty as to the existing condition of premises on a proposed letting as it does in the case of a promise or contract to do something to or on them (*n*). The question as to when an action may be maintained upon representations of this kind has already been dealt with in some detail (*o*).

The stamp.

"An agreement for a lease or tack, or with respect to the letting, of any lands, tenements, or heritable subjects for any term not exceeding thirty-five years, or for any indefinite term, is to be charged with the same duty as if it were an actual lease or tack made for the term and consideration mentioned in the agreement"; and "a lease or tack made subsequently to and in conformity with such an agreement duly stamped is to be charged with the duty of sixpence only" (*p*).

If a written proposal to grant a lease be accepted verbally, no stamp is required (*q*). But where a proposal (even a verbal proposal) is accepted in writing, a stamp is always necessary (*r*); and similarly if the terms of a concluded agreement for letting are altered by a subsequent document, which creates a new or substituted agreement (*s*). So an agreement must be stamped if a memorandum of a contract of letting, even though, as such, it be insufficient to satisfy the Statute of Frauds (*t*); but not where it is unsigned, for such a document is merely collateral to the taking (*u*).

A draft agreement for letting, however, settled by the solicitors of both parties, requires a stamp even if unsigned, at least where

(*k*) *Morgan v. Griffith*, L. R. 6 Ex. 70; *Erskine v. Adeane*, L. R. 8 Ch. 756.

(*l*) *Carter v. Salmon*, 43 L. T. 490, per Cotton, L. J. See, however, pp. 417 *et seq.*, post.

(*m*) See p. 147, ante.

(*n*) *De Lassalle v. Guildford*, [1901] 2 K. B. 215.

(*o*) Ante, p. 146.

(*p*) 54 & 55 Vict. c. 39, s. 75. See ante, p. 324.

(*q*) *Drant v. Brown*, 3 B. & C. 665; *Laing v. Smith*, 3 F. & F. 97.

(*r*) *Drant v. Brown*, *supra*, per Holroyd, J.

(*s*) *Atherstone v. Bostock*, 2 M. & Gr. 511. Cf. ante, p. 329.

(*t*) *Ramsbottom v. Mortley*, 2 M. & S. 445.

(*u*) *Ramsbottom v. Tunbridge*, 2 M. & S. 434; *Hawkins v. Warre*, 3 B. & C. 690.

the circumstances show that the parties treated it as an agreement and not as a mere proposal (*x*).

Where an unstamped agreement in writing for letting a tenement at a certain rent was lost, parol evidence of its contents was held inadmissible to show the value of the premises (*y*). Nor will the Court, in the exercise of its equitable jurisdiction, receive parol evidence of such an agreement, even where it is proved to have been fraudulently destroyed by the party against whom it is sought to be enforced (*z*).

Costs.

The question of the sums chargeable in respect of agreements for leases, as provided for by the Solicitors' Remuneration Order, 1882, has already been discussed (*a*).

(*x*) *Chadwick v. Clarke*, 1 C. B. 700;
White v. Whitehead, 13 T. L. R. 409.
(*Doe v. Pedgriph*, 4 C. & P. 312, *semb.*
cont.)

(*y*) *R. v. Castle Morton*, 3 B. & A. 588.
(*z*) *Smith v. Henley*, 1 Ph. 391.
(*a*) *Ante*, pp. 334-7.

CHAPTER III.

OCCUPATION UNDER IMPLIED DEMISE.

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THE tenancies already considered are those which have been created by lease, or by entry under an agreement for a lease, whether such agreement be one of which specific performance will be decreed or not. The next class of tenancies to be discussed are those created by the mere fact of entry and occupation, or, as it is sometimes expressed, by occupation under an implied demise or agreement. The most frequent instance of this kind of tenancy is where a tenant holds over and pays rent after the expiration of his term.

Tenancy at will.—The mere fact of occupation of premises by permission of their owner creates, as has already been stated (a), a tenancy at will (b). Whenever a person, for instance, is allowed by their owner to occupy premises rent-free (c)—*e.g.*, a *cestui que trust* by his trustee (d), or the minister of a chapel by the trustees

(a) *Ante*, p. 2.
 (b) *Doe v. Wood*, 14 M. & W. 682, per Parke, B.
 (c) *R. v. Collett*, Russ. & Ry. 498;

Day v. Day, L. R. 3 P. O. 751; *Lynes v. Snaith*, [1899] 1 Q. B. 486.
 (d) *Garrard v. Tuok*, 8 C. B. 231; *Melling v. Leak*, 16 C. B. 652.

of his congregation (*e*).—such person is *prima facie* a tenant at will (*f*). And—just as in the case of a void lease (*g*), or a mere agreement for a lease (*h*)—whenever a person is let into possession either under an instrument of mere general letting (*i*), or pending negotiations for a lease (*k*), or for an agreement for a lease (*l*), or for an assignment of a lease (*m*), or under a contract of purchase which afterwards falls through (*n*) (and this even though a portion of the purchase-money (*o*) or interest thereon (*p*) have been paid), the occupation *without more* impliedly creates a tenancy at will.

Further, though the act of holding over after the expiration of the term does not *necessarily* create a tenancy of any kind—it being in such case a question of fact what the intention of the parties was (*q*).—yet when a tenant continues in possession after such expiration by consent of his landlord, he also has been deemed *prima facie* a mere tenant at will (*r*). In the case, however, of a letting *for a year*, the implication from holding over by consent has been said (*s*) to be “a tacit renovation of the contract,”—a *dictum* interpreted in the same decision (*t*), and recently by the Court of Appeal (*u*), in the enlarged sense of implying a tenancy, not for another year, but from year to year (*x*); and a similar “renovation” would probably follow in the case of a letting for a single “period,” *e.g.*, a quarter, month, or week, of the ordinary periodic tenancies (*y*).

Tenancy from year to year.—The tenancy at will above spoken of, however, like the tenancy at will implied from the mere fact of

(*e*) *Doe v. Jones*, 10 B. & C. 718; *Perry v. Shipway*, 1 Giff. 1.

(*f*) As to cases, however, where no tenancy is created at all, see *ante*, pp. 6—9, and *post*, p. 679.

(*g*) *Ante*, p. 10.

(*h*) *Ante*, p. 343.

(*i*) *Richardson v. Langridge*, 4 Taunt. 128; cited *ante*, p. 2.

(*k*) *Doe v. Pullen*, 2 Bing. N. C. 749.

(*l*) *Coggan v. Warwick*, 3 C. & K. 40; *Doe v. Cartwright*, 3 B. & A. 326.

(*m*) *Pollen v. Brewer*, 7 C. B. N. S. 371; *Doe v. Lawder*, 1 Stark. 308, where, however, the tenancy is called one at sufferance.

(*n*) *Right v. Beard*, 13 East, 210; *Howard v. Shaw*, 8 M. & W. 118.

(*o*) *Doe v. Miller*, 5 C. & P. 595.

(*p*) *Doe v. Chamberlaine*, 5 M. & W. 14.

(*q*) *Jones v. Shears*, 4 A. & E. 832; *post*, p. 626.

(*r*) *Doe v. Stennett*, 2 Esp. 717.

(*s*) By Lord Mansfield, C. J., in *Right v. Darby*, 1 T. R. 159.

(*t*) By Buller, J. It will be observed that the original tenancy in this case being one, not for a year only, but from year to year, the point was not really before the Court for decision at all.

(*u*) *Dougal v. McCarthy*, [1893] 1 Q. B. 736.

(*x*) And consequently not expiring without proper notice at the end of the second year: see *post*, p. 606.

(*y*) It will be noticed that it was not necessary, for actually deciding the case last mentioned, to determine whether the renewed holding was for one year or from year to year; and, moreover, *dicta* in the judgments of Lord Esher, M. R., and A. L. Smith, L. J., which apparently warrant the extension of the doctrine to a holding over after the expiration of *any* term, are probably to be read strictly in relation to the existence of the original tenancy for one year in the case.

entry under a void lease (*z*), or under an agreement for a lease (*a*), at once gives way upon the payment of rent to a tenancy which, in the absence of evidence to the contrary, is presumed to be a tenancy from year to year (*b*). But such evidence, as already stated, may always be given, and the question as to the real nature of the tenancy is one of fact (*c*). A great inadequacy, for instance, in the amount of rent received as compared with the real value of the premises will be strong evidence "to the contrary" (*d*). So where a lessee held over and paid rent to the lessor, the latter was permitted to rebut the presumption by showing that he received such rent in ignorance of the fact that the tenancy had determined (*e*); and where it appears from all the circumstances that it was not the real intention of the parties to create any tenancy between them, the mere fact that periodical payments described as rent have been made by one to the other will not create a yearly tenancy, or a tenancy at all (*f*). The presumption, too, will be less readily made in the letting of furnished apartments, having regard to the usual practice in such cases (*g*).

Where, however, no such rebutting evidence is forthcoming, the inference derived from payment and acceptance of rent that the tenancy is one from year to year is conclusive (*h*). But such payment, though it need not be made to the person from whom the possession was received (*i*), must, as already stated (*k*), have been made with reference to a yearly holding, for payments made periodically but without reference to a year, or to some aliquot part of a year, will not suffice for this purpose (*l*). Actual payment, however, is not necessary (*m*), if anything legally equivalent to it can be shown (*n*). Similarly, a distress (*o*) will, as against the landlord (*p*), and submission to it will, as against the tenant (*q*), be an acknowledgment of a tenancy between the parties, and, if

(*z*) *Ante*, p. 11.

(*a*) *Ante*, p. 343.

(*b*) The dictum of Vaughan Williams, J., in *Mackay v. McGuire*, [1891] 1 Q. B. 250, as to the effect of accepting rent from a yearly tenant after the expiration of his tenancy, if properly reported, seems to be inaccurate.

(*c*) *Ante*, p. 344; *Simkin v. Ashurst*, 1 C. M. & B. 261.

(*d*) *Roe v. Prideaux*, 10 East, 158; *Smith v. Widdlake*, 3 C. P. Div. 10 (instances of a void lease, but the principle is the same).

(*e*) *Doe v. Crago*, 6 C. B. 90.

(*f*) *Camden (Lord) v. Batterbury*, 7

C. B. N. S. 864; *Taylor v. Jackson*, 2 C. & K. 22.

(*g*) *Wilson v. Abbott*, 3 B. & C. 88.

(*h*) *Bishop v. Howard*, 2 B. & C. 100 (*Freeman v. Jury*, Moo. & M. 19, *cont.*, has been disapproved: see *Woodcock v. Nuth*, 8 Bing. 170).

(*i*) *Roe v. Ward*, 1 H. Bl. 97.

(*k*) *Ante*, p. 344.

(*l*) *Richardson v. Langridge*, 4 Taunt. 128.

(*m*) See *Crump v. Temple*, 7 T. L. R. 120.

(*n*) *Ante*, p. 344.

(*o*) As to distress, see Book II., *post*.

(*p*) See *Zouch v. Willingale*, 1 H. Bl. 311, and p. 625, *post*.

(*q*) *Panton v. Jones*, 3 Camp. 372.

made in respect of rent due for some defined portion of a year, will, following the general rule, raise the implication of a tenancy from year to year between them.

In the case of holding over, the tenancy from year to year thus implied from the payment and acceptance of rent (*r*) will *prima facie* be subject to all the terms of the expired tenancy which can be applied to a tenancy from year to year (*s*). For though the question of terms, like the question as to what the nature of the holding is, is one purely of fact (*t*), the presumption is that the tenant holds over on the same terms (*u*) as he held on during the former tenancy (*x*), so far as such terms are applicable to a yearly holding (*y*); and even if he hold over at an increased rent, the other terms of the tenancy will still apply (*z*). But this presumption may always be rebutted (*a*): for instance, where a lessee holds over after the death of a tenant for life, and pays rent to the remainderman, by showing that a particular stipulation in the former tenancy, not in accordance with the custom of the country, was unknown to the new landlord (*b*). It will not, however, be rebutted by merely showing that the stipulation is not in accordance with the custom of the country, for such custom may always be excluded by agreement (*c*).

An undertaking to pay rent in advance (*d*), a proviso for re-entry on non-payment of rent (*e*), a stipulation that the tenant of a farm shall retain and sow a portion of the premises for his own benefit after the end of the term (*f*), or that he shall be entitled at the end of the term to the away-going crops (*g*), a custom that he shall receive an allowance for seeds and labour in the last year of his possession (*h*)—have all been held applicable to such yearly holding; and generally any covenants in the lease for particular modes of cultivation will be applicable to the yearly tenancy (*i*). On the other hand, where a person held over as yearly tenant on the

(*r*) As to when it begins, see *post*, p. 610.

(*s*) See 2 Sm. L. C. 120, 124 (11th ed.).
(*t*) *Mayor of Thetford v. Tyler*, 8 Q. B. 95; *Hyatt v. Griffiths*, 17 Q. B. 505.

(*u*) This also applies where at the end of a lease the lessee is expressly authorized to hold as tenant at will: *Morgan v. Harrison*, [1907] 2 Ch. 137, per Cozens-Hardy, M. R.

(*x*) *Finch v. Miller*, 5 C. B. 428.

(*y*) *Hyatt v. Griffiths*, *supra*.

(*z*) *Digby v. Atkinson*, 4 Camp. 275; *Kelly v. Patterson*, L. R. 9 C. P. 681.

(*a*) *Elgar v. Watson*, Car. & M. 494.

(*b*) *Oakley v. Monck*, L. R. 1 Ex. 139. *Secus*, where such stipulation is known to all the parties: *Wyatt v. Cole*, 36 L. T. 618.

(*c*) *Roberts v. Barker*, 1 Cr. & M. 808. See *ante*, p. 152, and *post*, pp. 719, 720.

(*d*) *Dougal v. McCarthy*, [1893] 1 Q. B. 736.

(*e*) *Thomas v. Paeker*, 1 H. & N. 669.

(*f*) *Hyatt v. Griffiths*, 17 Q. B. 505.

(*g*) *Boraston v. Green*, 16 East, 71.

(*h*) *Hutton v. Warren*, 1 M. & W. 466.

(*i*) *Roe v. Ward*, 1 H. Bl. 97, per Wilson, J. See now, as to such covenants, 6 Edw. 7, c. 56, s. 3 (1); *ante*, p. 294.

expiration of a three years' agreement in which he had undertaken to pay all outgoings in respect of the premises, it was held that the provision for the payment of outgoings was not applicable to the yearly tenancy so as to make him liable for the cost of a sanitary improvement ordered by the local authority, having regard to the proportion borne by such cost to the amount of his rent (*l*). In deciding the question whether any special stipulation can apply to such a yearly holding, the principle is the same as in the case already discussed (*l*) of a void lease or of an agreement (*m*); so that, for instance, a tenant holding over, who has been under a similar obligation by the terms of his lease, will be bound to repair (*n*), *i.e.* (as it seems), to do (so-called) tenantable, as distinguished from substantial, repairs (*o*). But where a tenant who had covenanted to put the premises in the same state of repair at the end of his term as they were in at the commencement, failed to do so, and held over as yearly tenant, it was decided that, though undoubtedly liable in respect of the original breach of covenant, he was not liable *as such yearly tenant* to put the premises into the same repair as they were in at the commencement of the term (*p*).

THE ACTION FOR USE AND OCCUPATION.

The fact of occupation by one person of premises belonging to another, by permission express or implied, gives rise to a presumption that a reasonable compensation for their use has been agreed upon between the parties (*q*). In this way arises usually the action for "use and occupation," which is thus seen to be always founded on agreement or contract (*r*). When there has been no express agreement between the parties, or when, there being an agreement, the amount of rent to be paid has not been settled, this form of action may be resorted to; and even when the agreement defines the amount of rent to be paid it is not unusual in suing

(*k*) *Harris v. Hickman*, [1904] 1 K. B. 13. See, however, on this case, *ante*, p. 195.

(*l*) *Ante*, p. 344.

(*m*) *Doe v. Amey*, 12 A. & E. 476, per Williams, J.

(*n*) *Ecclesiastical Commissioners v. Merral*, L. R. 4 Ex. 162.

(*o*) *Bowes v. Croll*, 6 E. & B. 255, per

Erle, J.; *Doe v. Amey*, *supra*, per Lord Denman, C. J. See *ante*, pp. 150, 219.

(*p*) *Johnson v. St. Peter, Hereford*, 4 A. & E. 520.

(*q*) *Gibson v. Kirk*, 1 Q. B. 850, per Lord Denman, C. J.

(*r*) *Birch v. Wright*, 1 T. R. at p. 387, per Buller, J.; *Churchward v. Ford*, 2 H. & N. 446; *Lemprière v. Lange*, 12 Ch. D. 675.

for it to add a claim for use and occupation (*s*), especially when there has been by consent some departure from the original contract. So where an agreement exists by which a stipulated rent is to be paid, if the landlord is from any cause precluded from recovering it (*e.g.*, where its payment is made conditional on the execution by him upon the premises of repairs which he has failed to complete (*t*), or where an eviction by title paramount occurs from the possession of a portion of the premises he has agreed to let (*u*)), the tenant, if he enjoys the occupation, may be sued in this action for so much as such occupation may be reasonably worth (*x*).

This form of action lay at common law (*y*), but the landlord was then always liable to have his claim defeated by proof of any demise (*z*). By the statute 11 Geo. 2, c. 19, s. 14, however, it is provided that "it shall and may be lawful for the landlord or landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the defendant or defendants, in an action . . . for the use and occupation of what was so held or enjoyed; and if in evidence on the trial of such action any parol demise or any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff in such action shall not therefore be non-suited, but may make use thereof as an evidence of the *quantum* of the damages to be recovered." Where, therefore, there is a demise by deed the action for rent must be brought on the deed and cannot be brought under the statute (*a*); but an action for use and occupation under the statute has been held to lie even though it be founded upon an agreement by deed, where that agreement does not amount (*b*) to an actual demise (*c*). And a lease by deed operating only as an escrow (*d*), or a demise not executed by the lessor (*e*), is not a demise "by deed" so as to defeat an action for use and occupation brought upon it.

The presumption, however, of a contract to pay a reasonable sum which arises from the defendant's occupation of the plaintiff's

(*s*) See, *e.g.*, *Wilson v. Finch-Hatton*, 2 Ex. D. 336.

(*t*) *Smith v. Eldridge*, 15 C. B. 236.

(*u*) *Tomlinson v. Day*, 2 B. & B. 680; *ante*, pp. 169, 170.

(*x*) See *infra*, pp. 409, 410.

(*y*) *Egler v. Marsden*, 5 Taunt. 25.

(*z*) *Churchward v. Ford*, 2 H. & N. 446, per Bramwell, B.

(*a*) *Dungey v. Angove*, 2 Ves. at p. 307, per Lord Loughborough, L. C.

(*b*) See *ante*, p. 75.

(*c*) *Elliott v. Rogers*, 4 Esp. 59. *Sed qu.*

(*d*) *Gudgen v. Besset*, 6 E. & B. 986; *ante*, p. 106.

(*e*) *Ante*, p. 21; *Pitman v. Woodbury*, 3 Exch. 4.

property (*f*) may be rebutted by proof of circumstances which show that such occupation was to be without compensation (*g*). It ceases, too, when the occupation ceases, and as no express time is limited for its payment, the compensation accrues from day to day (*h*). But this will not entitle a landlord, under an agreement by which rent is made payable at stated periods, to recover in use and occupation before one of such periods has elapsed (*i*). So if the tenancy is determined by agreement in the middle of a period (*k*), no compensation was formerly recoverable in this action, either for the time during which the occupation was actually had (*l*), or for the remainder (*m*); but as regards the period of actual occupation this appears to be now altered by virtue of the Apportionment Act (*n*). And if the tenant after having already paid rent for the period up to such agreement remain in occupation after it, he will be liable in this action for the period of such subsequent occupation (*o*).

The occupation for which the statute allows the action to be brought is that of "lands, tenements, or hereditaments" (*p*); so that it lies for the use of incorporeal as well as of corporeal property, *e.g.*, for tolls (*q*), for tithes (*r*), for the enjoyment of a watercourse (*s*), of rights of fishing (*t*), of shooting (*u*), or of sporting generally (*x*), and of a right to take minerals (*y*).

The writ may be indorsed, *e.g.*, as follows (*z*): "The plaintiff's claim is £ for the use and occupation of a house." The action being one for damages (*a*), it seems clear that a special indorsement cannot be resorted to.

Conditions which must be fulfilled.—In order that the action for use and occupation may be maintainable, there must have been *entry by the defendant for purposes of occupation under an agreement with the plaintiff*. Three elements are seen to be here included.

(*f*) *Gibson v. Kirk*, *ubi sup.*; *Hellier v. Silcox*, 19 L. J. Q. B. 295, explained in *Churchward v. Ford*, *supra*.

(*g*) *Howard v. Shaw*, 8 M. & W. 118, per Parke, B.; *Crouch v. Tregonning*, L. R. 7 Ex. 88, per Bramwell, B.

(*h*) *Gibson v. Kirk*, 1 Q. B. 850, per Lord Denman, C. J.; *Packer v. Gibbins*, 1 Q. B. 421.

(*i*) *Collett v. Curling*, 10 Q. B. 785.

(*k*) See *post*, pp. 629 *et seq.*

(*l*) *Grimman v. Legge*, 8 B. & C. 324.

(*m*) *Whitehead v. Clifford*, 5 Taunt. 518.

(*n*) *Ante*, p. 123.

(*o*) *Kirkman v. Jervis*, 7 Dowl. 678.

(*p*) *Supra*, p. 398.

(*q*) *Mayor of Carmarthen v. Lewis*, 6 C. & P. 608.

(*r*) *Id.*, per Parke, B.

(*s*) *Davis v. Morgan*, 4 B. & C. 8.

(*t*) *Holford v. Pritchard*, 3 Exch. 793.

(*u*) *Dawes v. Dowling*, 31 L. T. 65. *■*

(*x*) *Tomlinson v. Day*, 2 B. & B. 680.

(*y*) *Jones v. Reynolds*, 4 A. & E. 805.

(*z*) R. S. C. 1883, App. A., Pt. III., s. 2.

(*a*) See the statute as set out *supra*, p. 398.

(a) *Entry by defendant*.—Before entry a tenant has, at the most, an *interesse termini* (b), and will in no case be liable for use and occupation (c); hence the mere production of a written agreement executed by him, by which he was to take premises from a future day, was held not to be sufficient to render him liable without proof of entry (d). But in joint tenancies entry by one tenant is entry by all (e). The case of executors, however, forms an exception to the general rule (f); and *when sued in their representative capacity* (g), entry by their testator will be equivalent to entry by them, so as to render them liable if they do not give up the possession, even if they have not occupied at all (h).

(b) *For purposes of occupation*.—The entry by the defendant must have been with the intention of occupying *as tenant*. Consequently such acts as merely digging holes in land proposed to be taken for mining purposes in order to examine its fitness (i), sending in coals to the demised premises through a mistake (k), the detention for a short period by a tenant, from inadvertence, of the key of premises which he had quitted (l), the temporary occupation of premises by assignees for the benefit of a tenant's creditors for the purpose of conducting a sale of his goods (m),—have been held not to entail liability in this action. On the other hand, acts of ownership exercised over the demised premises, such as sending in a person to do certain repairs, *e.g.*, to clean and paper one of the rooms (n), or putting up a board announcing them as to let (o), have been held sufficient. The question as to what the intention was is in each case one of fact for a jury to decide (p).

Actual occupation is not necessary: the words of the statute are “held *or* occupied” (q), so that it is sufficient once there has been entry (inasmuch as the defendant then “holds”) if he might have occupied had he chosen to do so (r); and the liability continues until the tenancy is properly determined (s). If there has been

- (b) *Ante*, p. 20.
 (c) *Edge v. Stafford*, 1 C. & J. 391; *Lowe v. Ross*, 5 Exch. 553.
 (d) *Woolley v. Watling*, 7 C. & P. 610.
 (e) *Glen v. Dungey*, 4 Exch. 61; *Electric Telegraph Co. v. Moore*, 2 F. & F. 363. For cases of constructive occupation, see under next head.
 (f) *Nation v. Tozer*, 1 C. M. & R. 172.
 (g) See p. 407, *infra*.
 (h) *Atkins v. Humphrey*, 2 C. B. 654.
 (i) *Jones v. Reynolds*, 7 C. & P. 335.
 (k) *De Medina v. Polson*, Holt, N. P. C. 47.
 (l) *Gray v. Bompas*, 11 C. B. N. S. 520.
 (m) *How v. Kennett*, 3 A. & E. 659.
 (n) *Smith v. Twoart*, 2 M. & Gr. 811.
 (o) *Sullivan v. Jones*, 3 C. & P. 579.
 (p) See the foregoing cases.
 (q) *Supra*, p. 398.
 (r) *Conolly v. Baxter*, 2 Stark. 525, per Abbott, C. J.; *Whitehead v. Clifford*, 5 Taunt. 518, per Gibbs, C. J.; *Pinero v. Judson*, 6 Bing. 206.
 (s) *Ward v. Mason*, 9 Price, 291; *Bennell v. Lundberg*, 7 Q. B. 638.

an actual holding, and the power to occupy or enjoy is given by the landlord to the tenant, so far as depends on the landlord, the action is maintainable (*t*),—even, for example, in the case of the destruction of a floor or flat by fire (*u*); for the space inclosed by the four walls still continues as marked out by them (*x*), and if the landlord rebuilt the premises the tenant might insist on re-entering, and their obligations should be reciprocal (*t*). Nor does it make any difference that the period of the agreed letting is not continuous, as where premises are let by one entire agreement for successive public holidays (*y*). So also occupation by another person, *e.g.*, an agent (*z*) (provided such person be proved to have occupied at the defendant's request (*a*)), or a sub-tenant (*b*), or an assignee not accepted as tenant (*c*), will suffice. Hence where a person, on the execution of an agreement for a demise to him, procured attornments from some of the occupiers and received rents from others, he was held to be in the same position as if he had occupied himself (*d*). The question as to the real relationship between the defendant and the actual occupier in these cases is one of fact (*e*); nor is the circumstance that the defendant has not received rent from him conclusive that the latter is not his sub-tenant (*f*). The foregoing results are usually expressed by saying that the action will lie in respect of an occupation which is merely constructive (*g*). It will not, however, lie for rent payable, under an agreement, in advance (*h*).

(*c*) *By agreement with plaintiff*.—Inasmuch as the action for use and occupation, as already stated (*i*), is founded on contract, it is incumbent on the plaintiff to be able to show that an agreement was made *with him* (*k*), though such agreement will be implied where nothing appears except that he is entitled to land which the defendant has occupied (*l*); and his claim may always be defeated by proof that the agreement under which the occupation was had,

(*f*) Per Tindal, C. J., in next-cited case.

(*u*) *Ison v. Gorton*, 5 Bing. N. C. 501.

(*z*) See note (*a*), p. 170, *ante*.

(*y*) *Smallwood v. Sheppards*, [1895] 2 Q. B. 627; cited *ante*, p. 7.

(*s*) *Lowe v. L. & N. W. Ry. Co.*, 18 Q. B. 632.

(*a*) See *Naish v. Tatlock*, 2 H. Bl. 319; *Richardson v. Hall*, 1 B. & B. 50. (*Gibson v. Courthope*, 1 D. & Ry. 205, *semb. cont.*)

(*b*) *Bull v. Sibbs*, 8 T. R. 327; *Smith v. Eldridge*, 15 C. B. 236.

(*e*) *Shine v. Dillon*, 1 Ir. Rep. C. L. 277.

(*d*) *Neale v. Swind*, 2 C. & J. 377.

(*e*) See *Waring v. King*, 8 M. & W. 571.

(*f*) *Bull v. Sibbs*, *supra*.

(*g*) *Towne v. d'Heinrich*, 13 C. B. 892.

(*h*) *Angell v. Randall*, 16 L. T. 498.

(*i*) *Supra*, p. 397.

(*k*) *Powell v. Hibbert*, 15 Q. B. 129.

(*l*) *Hellier v. Silcock*, 19 L. J. Q. B. 295, explained in *Churchward v. Ford*, 2 H. & N. 446.

whether entered into with (*m*) or without (*n*) his assent, was made not with him but with another person (*o*). Thus it has been held (before the Judicature Acts) that the survivors of several lessors could not sue in their own names only, in respect of an occupation had during the lifetime of a co-lessor, which was therefore by agreement with him also (*p*); though it is otherwise as regards a subsequent occupation (*q*).

The occupation, however, may be in point of law only, and not in point of fact, by agreement with the plaintiff, as where he claims as principal upon an agreement made by an agent (*r*), or where he has during its continuance been substituted as landlord for the person with whom the agreement was in fact made (*s*). The most ordinary instance of this is where the plaintiff has acquired the reversion by assignment from such person (*t*); but in order to succeed he must have the legal estate (*u*), and he cannot, as it seems, recover by this action in respect of the period before the assignment (*x*), for there was then no occupation of the *plaintiff's* property by his permission (*y*). Similarly, the plaintiff can also recover as assignee when, the occupation being only under a yearly tenancy, he abstains from determining it by notice (*z*). As in all similar cases, the question whether there is any evidence of an agreement express or implied between the parties is one for the Court, while its actual existence is for the jury (*a*).

The condition, for use and occupation to be maintainable, requiring an agreement express or implied between the parties is often referred to by saying (*b*) that the relationship of landlord and tenant must exist between them; not necessarily, however, in the strict sense, for the action, like the action for rent (*c*), will lie even where the plaintiff, having parted with his whole interest, has no reversion in respect of which he can distrain (*d*). It follows, also, that the occupation must necessarily have been with the

(*m*) *Churchward v. Ford*, *supra*.

(*n*) *Sloper v. Saunders*, 29 L. J. Ex. 275.

(*o*) *Newport v. Hardy*, 2 D. & L. 921.

(*p*) *Israel v. Simmons*, 2 Stark. 356.

(*q*) *Wheatley v. Boyd*, 7 Exch. 20.

(*r*) *Israel v. Simmons*, *supra*, per Abbott, J.

(*s*) *Green v. London Cemetery Co.*, 9 C. & P. 6.

(*t*) *Standen v. Christmas*, 10 Q. B. at p. 143. See *post*, p. 432.

(*u*) *Cobb v. Carpenter*, 2 Camp. 13, n.; cited *infra*, p. 404.

(*x*) *Mortimer v. Preedy*, 3 M. & W. 602.

(*y*) Roscoe, N. P. 336 (17th ed.).

(*z*) *Lumley v. Hodgson*, 16 East, 99, explained in *Standen v. Christmas*, *supra*.

(*a*) *Levy v. Lewis*, 9 C. B. N. S. 872.

(*b*) See, e.g., *Camden (Lord) v. Batterbury*, 7 C. B. N. S. 864; *Crouch v. Tregonning*, L. R. 7 Ex. 88.

(*c*) *Ante*, p. 161.

(*d*) *Pollock v. Stacy*, 9 Q. B. 1033; *Levy v. Lewis*, 9 C. B. N. S. 872.

plaintiff's *permission*, and not adversely to him (*e*), or wrongfully, as by a mere trespass (*f*). The question, however, as to how far a trespass may be waived and use and occupation thereupon maintained may perhaps be described—except where the defendant is actually setting up an adverse title (*g*)—as still open (*h*). But any tenancy—*e.g.*, a tenancy at will (*i*)—will suffice for the purpose of founding the action; and even in a tenancy at sufferance, though the holding over is not with the assent of the landlord (*k*), the mere abstention from his right to eject the tenant (for if he bring ejectment he cannot sue in this action for rent subsequently due (*l*)) is deemed to be a sufficient permission by him to enable him to maintain the action (*m*). This, however, only applies in respect of the time during which such holding over lasts (*n*); though if the acts of the tenant amount to the exercise by him of an option conferred upon him by his contract of continuing tenant for a further specified term, he may become liable for at least a year's occupation (*o*). And on the principle of constructive occupation already explained (*p*), the liability of the tenant, who is bound to give up absolute possession at the end of the term (*q*), is just the same if the holding over be by his subtenant (*r*), or—in the case of a joint tenancy—by a co-tenant with (*s*) (but not without (*t*)) his assent, or in general by any party who has come in through his instrumentality (*u*).

The foregoing principles having been established, their application to particular classes of persons by and against whom the action has been held maintainable may now be illustrated:—

(*e*) *Cripps v. Blank*, 9 D. and Ry. 480; *Tew v. Jones*, 18 M. & W. 12.

(*f*) See two next-cited cases.

(*g*) *Phillips v. Homfray*, 24 Ch. Div. at p. 461, per Bowen L. J.

(*h*) *Turner v. Cameron's Coal Co.*, 5 Exch. 982. The judgment suggests that it should be answered in the negative.

(*i*) *Howard v. Shaw*, 8 M. & W. 118; *Coggan v. Warwick*, 3 C. & K. 40.

(*k*) *Ante*, p. 1. As to the creation of a new tenancy by holding over, see *supra*, pp. 394—397.

(*l*) *Birch v. Wright*, 1 T. R. at p. 387; *ante*, p. 167.

(*m*) *Jenner v. Clegg*, 1 Moo. & R. 213, per Parke, J.; *Bayley v. Bradley*, 5 C. B. 396; *Leigh v. Dickeson*, 15 Q. B. Div. 60 (action by one tenant in common against the other holding over after a demise from the former).

(*n*) *Christy v. Tancred*, 9 M. & W. 438.

(*o*) *Waring v. King*, 8 M. & W. 571.

(*p*) *Supra*, p. 401.

(*q*) See *post*, p. 751.

(*r*) *Harding v. Crethorn*, 1 Esp. 57, per Lord Kenyon, C. J.; *Ibbe v. Richardson*, 9 A. & E. 849. In the latter case it was further held that the same limitation of liability—to the time of actual holding over—applies as in the case where the holding over is by the tenant himself (*supra*, at note (*n*)).

(*s*) *Christy v. Tancred*, 9 M. & W. 438; *Tancred v. Christy*, 12 M. & W. 316. The co-tenant is, of course, in such case equally liable: *S. C.*

(*t*) *Draper v. Crofts*, 15 M. & W. 166.

(*u*) *Christy v. Tancred*, 9 M. & W. 438, per Lord Abinger, C. B.

1. *By agents*.—It follows from the general principle that a mere agent, such as an auctioneer, cannot sue in use and occupation, at least where it appeared at the time on whose behalf the letting was (x); but it is otherwise if the letting was by him personally as principal (y).

2. *By trustees and equitable owners*.—Another illustration of the necessity of a contractual relation existing between the plaintiff and defendant is seen in the fact that, as on the one hand where the letting is by a trustee the *cestui que trust* cannot sue (z) (unless under circumstances where the former may be considered to have acted as agent for the latter, and for him alone (z)), so on the other the action cannot be brought by the trustee where the letting has been by the *cestui que trust* (a). But the mere fact that the plaintiff has only an equitable interest will not prevent him from suing, *provided the defendant has in effect recognized him as his landlord* (b), as by originally obtaining the possession with his permission (c), or by paying him rent afterwards (d); for in this case the plaintiff can take advantage of the principle of estoppel (e).

3. *By mortgagors and mortgagees*.

(a) *Mortgagors*: (1.) Tenancy before mortgage.—In accordance with a principle hereafter explained, the tenant is not estopped from showing that his lessor's title has expired (f); hence the mortgagor must in this case be prepared to show, before he can recover in this action, that he has not parted with his reversion altogether, *e.g.*, that he has a legal reversion vested in him by way of re-demise from the mortgagee (g). But this will not, of course, prevent an action of use and occupation by him under a special agreement; thus, where an arrangement had been made between all the parties by which the tenant was to pay the interest on the mortgage debt to the mortgagee, and the residue of the rent to the mortgagor, it was held that the tenant was liable to the mortgagor in this action for subsequently paying the whole rent to the mortgagee (h). And if entitled for the time being (otherwise than under a deed) to the receipt of the rents and profits of land, as to which no notice of his intention to enter into the receipt of

(x) *Evans v. Evans*, 3 A. & E. 132.

(y) *Fisher v. Marsh*, 6 B. & S. 411.

(z) *Morgell v. Paul*, 2 M. & Ry. 303.

(a) *Churchward v. Ford*, 2 H. & N. 446.

(b) *Cobb v. Carpenter*, 2 Camp. 13, n. Cf. *supra*, p. 402.

(c) *Hull v. Vaughan*, 6 Price, 157.

(d) *Dolby v. Iles*, 11 A. & E. 335.

(e) See *post*, pp. 466 *et seq.*

(f) *Post*, p. 469.

(g) *Wilkinson v. Hall*, 3 Bing. N. C. 508.

(h) *Whitmore v. Walker*, 2 C. & K. 615.

them has been given by the mortgagee, the mortgagor seems now enabled to sue in use and occupation for such rents and profits in his own name only, unless the cause of action arise upon a lease or other contract made by him jointly with another person (*i*).

(2.) Tenancy after mortgage.—The mortgagor, as has already been seen (*k*), has now, by force of the Conveyancing Act, *prima facie* the right to demise after mortgage; and where such demise is not by deed he may sue for rent in use and occupation.

Independently, too, of that Act, the principle of estoppel will in this case, as explained hereafter (*l*), enable him, where he has made a demise not by deed, to recover rent in this action (*m*). Moreover, the provision as to mortgages contained in the Judicature Act, 1873 (*n*), seems to apply to this case also.

(b) *Mortgagees*: (1.) Tenancy before mortgage.—The mortgagee may, by giving notice of his mortgage to the tenant, recover as assignee of the reversion against him in use and occupation for rent both future and in arrear at the time of such notice (*o*),—even an increased rent which after the mortgage the tenant may have agreed to pay to the mortgagor upon certain improvements being made by him upon the premises (*p*).

(2.) Tenancy after mortgage.—In this case the action will clearly lie where the circumstances are such that a new tenancy can be implied between the tenant and the mortgagee (*q*). And it would seem also to be maintainable where the demise by the mortgagor, not being by deed, is under the Conveyancing Act (*r*).

4. *By corporations, &c.*—Corporations aggregate may sue for rent in this form of action (*s*), even though where there is no demise by deed rent as such is not recoverable by them (*t*). So, trustees of a charity (*u*), churchwardens (*x*), overseers (*y*), and parish officers generally (*z*) may recover in use and occupation, when the conditions already described have been fulfilled.

(i) Jud. Act, 1873, s. 25, sub-s. 5.

(k) *Ante*, p. 61.

(l) *Post*, pp. 466 *et seq.*

(m) *Willon v. Dunn*, 17 Q. B. 294; *Hickman v. Machin*, 4 H. & N. 716.

(n) Sect. 25, sub-s. 5, *supra*.

(o) *Burrowes v. Gradin*, *infra*; *Rawson v. Eicke*, 7 A. & E. 451; see *ante*, p. 165.

(p) *Burrowes v. Gradin*, 1 D. & L. 213.

(q) See *Downs (Lord) v. Thompson*, 9 Q. B. 1037; *ante*, pp. 59, 60.

(r) See *ante*, p. 62, at note (*f*).

(s) *Dean of Rochester v. Pierce*, 1 Camp. 466; *Mayor of Stafford v. Till*, 4 Bing. 75; *Mayor of Thetford v. Tyler*, 8 Q. B. 95; *Drury Lane Co. v. Chapman*, 1 C. & K. 14.

(t) See *ante*, p. 46.

(u) *Allason v. Stark*, 9 A. & E. 255.

(x) See *Ward v. Clarke*, 12 M. & W. 747.

(y) *Hardon v. Hesketh*, 4 H. & N. 175.

(z) *Rumball v. Munt*, 8 Q. B. 382. See pp. 53–4, *ante*.

5. *Against purchasers and vendors.*—A further consequence of the general principle already established is that where, as sometimes happens, a proposed purchaser of premises is let into possession before the purchase is completed, and the purchase afterwards goes off for want of title in the vendor, the latter cannot recover in use and occupation for the period over which the negotiations have extended, because the entry and possession were not upon an understanding that any compensation was to be made in the event which has arisen (*a*). Sometimes, however, the contract of sale expressly stipulates that the purchaser on being let into possession shall pay the vendor a certain sum periodically until completion, and when this is the case the relation of landlord and tenant is created between the parties (*b*); but where vendors, though all interested in the premises, have no legal interest in common, a tenancy to them jointly will not be implied from the mere circumstance of the purchaser being let into possession under conditions of sale containing such a stipulation (*c*).

The above rule holds good whether such occupation has proved beneficial (*d*) or not (*e*); and *a fortiori* where the vendor has had the use of the purchase-money during the time it has lasted (*f*). And it applies equally where the occupation is had under an agreement for a lease which the proposed lessor fails to grant (*g*); though it is otherwise where the failure is due to the acts of the proposed lessee (*h*). But where a person is let into possession with a view to an agreement or lease, but without any agreement having been concluded at all (*i*), or where, an agreement having been concluded, no rent is to be payable until some condition has been performed by the lessor (*k*), he will, if the occupation be beneficial, be liable in an action of use and occupation for so much as it was reasonably worth (*l*). And if in the case of a contract of purchase the possession be retained *after the contract has gone off*, use and occupation may be brought in respect of such subsequent possession (*m*). Where an intended sub-tenant was let into occupation, and the superior landlords, in consequence of their licence not

(*a*) *Winterbottom v. Ingham*, 7 Q. B. 611, per Lord Denman, C. J.

(*b*) *Saunders v. Musgrave*, 6 B. & C. 524.

(*c*) *Seaton v. Booth*, 4 A. & E. 528.

(*d*) *Winterbottom v. Ingham*, *supra*.

(*e*) *Heirn v. Tomlin, Peake*, 253.

(*f*) *Kirtland v. Pounsett*, 2 Taunt. 145.

(*g*) *Rumball v. Wright*, 1 C. & P. 589. In this case the lessee had even received rent from sub-tenants.

(*h*) *Id.*, per Best, C. J., explaining *Hull v. Vaughan*, 6 Price, 157.

(*i*) *Coggan v. Warwick*, 3 C. & K. 40.

(*k*) *Smith v. Eldridge*, 15 C. B. 236.

(*l*) *Dawes v. Dowling*, 31 L. T. 63.

(*m*) *Howard v. Shaw*, 8 M. & W. 118.

having been obtained, procured an injunction (*n*) to restrain their lessees from making the intended sub-lease, it was held that the sub-tenant, who failed thereupon to deliver up the keys of the premises, was liable to his lessors in use and occupation (until he delivered them) from the grant of the injunction but not before (*o*).

On the other hand, the vendor of property who remains in possession after he has conveyed it to a purchaser, is not liable to him in this action, as no tenancy can be implied between the parties from this circumstance (*p*); but where it is expressly stipulated that the purchaser shall receive all rents and profits from a day fixed for the completion of the purchase, he may recover a fair occupation rent from the vendor for the time, subsequent to such day, during which he remains in possession (*q*).

6. *Against executors.*—With regard to the liability of executors (*r*),—if upon a tenant's death his personal representatives do not give up possession of the premises, they may be made chargeable in their representative character by an action of use and occupation for the time the possession is retained (*s*); but for this the compensation must in terms be alleged to be due under a contract made with the testator, as otherwise they can only be made liable personally (*t*). In order, however, that personal liability may arise, there must have been occupation by them (*u*), and it must have been productive of some profit (*x*); for the executor may discharge himself from such liability (except as far as the profits go) by showing that he entered only as executor, that he has no assets, and that the value of the premises is not equal to the rent (*y*). If, on the other hand, the executor is sued in his representative capacity, he may also show that the land yields no profit—or some profit, his defence going then only to the balance—and that he has no assets *aliunde* (*z*).

7. *Against corporations, &c.*—Corporations aggregate may be sued, where the occupation by them has been for a corporate

(*n*) *Ante*, p. 281.

(*o*) *Fawkner v. Booth*, 10 T. L. R. 83.

(*p*) *Tew v. Jones*, 13 M. & W. 12.

(*q*) *Met. Ry. Co. v. Defries*, 2 Q. B. Div. 387.

(*r*) As to the general liability of executors for rent, &c., see *post*, pp. 443—447.

(*s*) *Atkins v. Humphrey*, 2 C. B. 654, per Tindal, C. J.

(*t*) *Wigley v. Ashton*, 3 B. & A. 101; *Nixon v. Quinn*, 2 Ir. Rep. O. L. 248.

(*u*) *Atkins v. Humphrey*, *supra*, per Maule, J. As to entry by one executor only, see p. 400, *supra*.

(*x*) *Remnant v. Bremridge*, 2 Moore, 94; 8 Taunt. 191; explained in *Hopwood v. Whaley*, 6 C. B. 744.

(*y*) *Patten v. Reid*, 6 L. T. 281.

(*z*) Notes to *Dean of Bristol v. Guyse*, 1 Wms. Saund. 124 (ed. 1871).

purpose (a), in an action of use and occupation (b). But they are only liable for the period they actually occupy, because, as a corporation cannot contract except under seal, no tenancy can be implied as to any subsequent period (c). The action has also been held to be maintainable against churchwardens, overseers, and surveyors of highways in a certain parish, who have hired land for the use of the poor residing therein (d).

Evidence: (a) *For plaintiff*.—The relationship of landlord and tenant which is necessary to found the action (e) may be proved in various ways. In the first place, if the defendant has received possession of the premises from the plaintiff, no evidence on the point need be forthcoming at all, as the former will be estopped from denying the title of the latter as his landlord (f). Next, where the possession is not so received, proof of an agreement by the defendant to be the plaintiff's tenant, or of attornment or payment of rent to him, or of submission to a distress by him, will, in the absence of explanation by the defendant (g), be conclusive evidence of such relationship. Other acts, however, may be relied on for the purpose, e.g., a notice to quit given by the defendant (h), a written request by him to the plaintiff (acknowledging such relationship) to withdraw a distress (i), a judgment in favour of the plaintiff in a former action of use and occupation (k) (provided the parties in the two actions are the same precisely (l)), even the mere fact of occupation by the defendant during the period (e.g., half-year or quarter) immediately preceding the one for which the action is brought (m);—but such acts are only *prima facie* evidence of the relationship, the effect of which can be rebutted by evidence to the contrary.

(b) *For defendant*.—The same defences are available as in the action for rent (n). One matter of defence, however, belongs more properly to this branch of the subject, as it seldom arises where rent is reserved under a formal instrument.

(a) *Love v. L. & N. W. Ry. Co.*, 18 Q. B. 632.

(b) *Finlay v. Bristol and Exeter Ry. Co.*, 7 Exch. 409. See, however, on this case, Pollock on Contracts, p. 150 (7th ed.).

(c) *Finlay v. Bristol and Exeter Ry. Co.*, *supra*: cf. *ante*, p. 70.

(d) See *Uthwatt v. Elkins*, 13 M. & W. 772; and cf. *ante*, pp. 54, 72.

(e) *Supra*, p. 402.

(f) See *post*, p. 466.

(g) See *post*, pp. 471, 472.

(h) *Marston v. Dean*, 7 C. & P. 13.

(i) *Hill v. Ramm*, 5 M. & Gr. 789.

(k) *Jones v. Reynolds*, 7 C. & P. 335.

(l) *Christy v. Tancred*, 9 M. & W. 438.

(m) *Harland v. Bromley*, 1 Stark. 455.

(n) *Ante*, pp. 162 *et seq.*

It often happens that during the currency of a tenancy the possession changes hands; and when this is the case doubts may arise as to the proper party to be sued in use and occupation. If there has been an acceptance by the landlord of the new tenant—whether he has come in under the original tenant (*o*), or directly under the landlord (*p*)—the original tenant is discharged (*q*) (unless the landlord's rights against him are expressly reserved (*r*)), because such acceptance amounts either to an eviction (*s*) or to a surrender by operation of law (*t*). The question as to whether there has been such an acceptance (without which he still continues liable (*u*)), is one of fact in each case (*x*). The new tenant, on the other hand, when such an acceptance is shown, may be sued for the rent in use and occupation (*y*); but it seems that for this liability to arise, his substitution as tenant for the original tenant must be express, and is not to be implied from mere acts of recognition on his part of the landlord, such as promises to pay rent to him (*z*).

Where the original tenant remains liable (*a*), he may, upon paying the landlord, recover the amount so paid from the new tenant in an action of use and occupation (*a*); and this even though the payment is only made after such action is brought, and is the sole evidence adduced to show (in a case of holding over) that the original tenant still had an interest in the premises sufficient to entitle him to sue in this action (*b*).

Damages.—Where a rent has been agreed upon between the parties, such rent will be the measure of damages (*c*), and this even though the agreement itself offend against the Statute of Frauds (*d*); for that statute will not, where the agreement has been followed either by entry or occupation (*e*), prevent the recovery of rent merely because such agreement is verbal (*f*). Nor will the tenant be entitled to any reduction by reason of acts

(*o*) *Thomas v. Cook*, 2 B. & A. 119; *Dawson v. Lamb*, 3 C. & K. 269.

(*p*) *Walls v. Atcheson*, 3 Bing. 462; *Hall v. Burgess*, 5 B. & C. 332; *Laurance v. Fauz*, 2 F. & F. 435.

(*q*) Cases in two last notes.

(*r*) *Dawson v. Lamb*, *supra*.

(*s*) See *ante*, p. 167.

(*t*) *Post*, p. 640. As to apportionment, see *ante*, pp. 120 *et seq.*

(*u*) See *Ward v. Mason*, 9 Price, 291.

(*x*) *Woodcock v. Nuth*, 8 Bing. 170; *post*, p. 641.

(*y*) *Phipps v. Sculthorpe*, 1 B. & A. 50; *Mayor of Thetford v. Tyler*, 8 Q. B. 95 (a case of holding over).

(*z*) *Hyde v. Moakes*, 5 C. & P. 42.

(*a*) As in *Dawson v. Lamb*, *supra*.

(*b*) *Levy v. Lewis*, 9 C. B. N. S. 872.

(*c*) 11 Geo. 2, c. 19, s. 14, *supra*, p. 398; *Gretton v. Mees*, 7 Ch. D. 833.

(*d*) *De Medina v. Polson*, Holt, N. P. C. 47.

(*e*) See *supra*, p. 400.

(*f*) *Smallwood v. Sheppards*, [1895] 2 Q. B. 627.

done by a third person (but without the authority of the plaintiff) which have diminished the value of his occupation, even though such third person be one who claims through the plaintiff (*g*). But where there is no express agreement as to rent (*h*), or where the whole agreement has been substantially departed from—*e.g.*, where the landlord fails to perform a condition precedent on his part, such as to repair (*i*), or where the tenant, owing to an eviction by title paramount, is interrupted in the full enjoyment of the possession agreed for (*k*),—the measure of damages is the reasonable value of the occupation which has actually been enjoyed. Thus, where the owner of a theatre let it for three weeks on an agreement by which half the whole sum payable as rent was to be paid in advance, and evicted the tenant after three days' occupation by reason of his failure to pay the sum in question, it was held that he was only entitled to nominal damages (*l*). And though a tenant who holds over after the end of his term without any fresh arrangement being come to is presumed to hold at the same rent (*m*), such a presumption may be rebutted (and the tenant charged for the real value of his occupation) by showing that there were circumstances known to both parties, by reason of which a different sum was to be paid for the continued holding (*n*).

(*g*) *Drury Lane Co. v. Chapman*, 1 C. & K. 14.

(*h*) *Mayor of Thetford v. Tyler*, 8 Q. B. 95, per Lord Denman, C. J.

(*i*) *Smith v. Eldridge*, 15 C. B. 236.

(*k*) *Tomlinson v. Day*, 5 Moore, 558;

2 B. & B. 680; explained in *Neale v. Mackenzie*, 1 M. & W. 747.

(*l*) *Mayer v. Southey*, 8 T. L. R. 395.

(*m*) *Supra*, p. 396.

(*n*) *Mayor of Thetford v. Tyler*, 8 Q. B. 95; *Elgar v. Watson*, Car. & M. 494. Cf. *supra*, p. 396, at note (b).

CHAPTER IV. ASSIGNMENT.

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THE relation of landlord and tenant may be created by assignment—i.e., by the transfer of the interest possessed in lands or hereditaments by one person to another. Unlike a lease or agreement, which creates that relationship directly, it requires that the relationship should already be in existence; but when that is the case it may be properly said to create it *as between particular persons*. There are two kinds of assignment,—one where the lessee assigns his term, the other where the lessor assigns his reversion. The former creates the relationship of landlord and tenant between the lessor and the assignee; the latter creates it between the assignee and the lessee; while the concurrence of

both creates it between the two assignees. Either kind of assignment, too, may be effected in two ways—by act of the parties, and by act of law.

I.—ASSIGNMENT BY ACT OF THE PARTIES.

Assignments by act of the parties, which were required by the Statute of Frauds to be in writing (*a*), must now be by deed, for by 8 & 9 Vict. c. 106 (*b*) “an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments shall be void at law unless made by deed.” This applies to assignments of leasehold interests of lessors as well as of lessees; and, inasmuch as a freehold interest also requires a deed for its transfer in every case (*c*), the above rule is general in its application to assignments by both landlord and tenant. It is not, however, to be inferred that a transfer without deed is wholly void, so as to have no legal effect at all. As will be presently pointed out (*d*), an invalid assignment may operate as a valid letting. So if for either landlord or tenant in a yearly holding there be substituted another person, without instrument of transfer under seal, the payment and acceptance of rent will create a tenancy as between such new parties; for in the absence of mistake or other explanation the person paying such rent will be estopped from disputing the title of the person to whom it is paid (*e*), and, on the principles already adverted to (*f*), such tenancy, in the absence of evidence to the contrary, will be presumed to be a tenancy from year to year (*g*).

An assignment, whether of a reversion or of a term, must be stamped with an *ad valorem* stamp as a conveyance (*h*).

Unlike a lease, by which the lessor grants an interest less than his own, and reserves to himself a reversion (*i*), by an assignment the assignor parts with his whole interest in the premises (*j*). And, conversely, where a person parts with his whole interest (*k*), or with

(*a*) 29 Car. 2, c. 3, s. 3. And this even though relating to a term which (not exceeding three years from the making: *ante*, p. 10) might have been created without writing: *Botling v. Martin*, 1 Camp. 317.

(*b*) Sect. 3. As to power to owner of chattels real to assign by deed directly to himself and another person, see 22 & 23 Vict. c. 35, s. 21.

(*c*) 8 & 9 Vict. c. 106, s. 3. See *Wms. Real Property*, Pt. 1, Ch. 6.

(*d*) *Infra*, at note (*o*).

(*e*) See p. 471, *post*.

(*f*) *Ante*, p. 395.

(*g*) See *infra*, pp. 421, 434.

(*h*) See 54 & 55 Vict. c. 39, 1st sched.

(*i*) *Ante*, p. 6.

(*j*) 2 Black. Comm. 326, 327.

(*k*) *Beardman v. Wilson*, L. R. 4 C.P. 57; *Lewis v. Baker*, [1905] 1 Ch. 46, per Eady, J.

a greater interest than he himself possesses (*l*), the instrument of transfer, by whatever name it may be called, is in reality an assignment,—*i.e.*, if made by deed, for otherwise it will be invalid as an assignment (*m*), but will enure, for purposes other than that of distress (*n*), as a valid letting (*o*). Nor does it make any difference that such instrument reserve rent (*p*), or a power of re-entry (*q*), to the assignor, or contain covenants not in the original lease (*q*). On the other hand, if the instrument pass a less interest than that possessed by the grantor, it is an underlease, and not an assignment (*r*).

An assignment is usually preceded by an agreement to assign. Inasmuch, however, as the relationship of landlord and tenant between the particular parties, as just explained (*s*), is not created before the assignment itself takes place, and the relation between the two parties to the agreement themselves belongs to the law of Vendors and Purchasers (*t*), this subject lies outside the scope of the present work. It will suffice to mention here that an agreement to assign is an agreement relating to an interest in land, and therefore one which by the 4th section of the Statute of Frauds (*u*) must be in writing (*x*). And the same thing holds of an agreement to procure the assignment of a lease by a person who has no interest in the premises (*y*). The question as to what covenants contained in a lease will be binding on a person who agrees to purchase an assignment of it, so that he may be compelled by the vendor to accept the assignment, has already been referred to (*z*).

If the lands demised be situate in Middlesex, Yorkshire, or the Bedford Level, assignments must (under pain of being postponed to assurances subsequent to themselves) be registered under the Acts which have already been noticed (*a*). The Yorkshire Act (*b*),

(*l*) *Baker v. Gosling*, 1 Bing. N. C. 19; *Wollaston v. Hakevill*, 3 M. & Gr. 297; *Williams v. Haywood*, 1 E. & E. 1040.

(*m*) *Supra*, p. 412.

(*n*) See *post*, p. 484.

(*o*) *Ante*, p. 161. As to specific performance in the case of such an instrument, see *Fenner v. Hepburn*, 2 Y. & C. 159.

(*p*) *Hazeldine v. Heaton*, C. & E. 40, Stephen, J.

(*q*) *Palmer v. Edwards*, 1 Doug. 187, n.

(*r*) *Derby (Lord) v. Taylor*, 1 East, 502. As to recovery of rent by action and distress respectively in these cases, see *ante*, p. 160, and *post*, p. 485.

(*s*) *Supra*, p. 411. Cf. also *infra*, p. 415.

(*t*) See 1 Dart, V. & P. chap. 6.

(*u*) See *ante*, p. 353.

(*x*) *Buttemere v. Hayes*, 5 M. & W. 456; *Cooking v. Ward*, 1 C. B. 858; *Kelly v. Webster*, 12 C. B. 283; *Smart v. Harding*, 15 C. B. 652. How far the actual decisions in these cases would apply at the present day, when all courts can enforce the equitable rights conferred by part performance (see p. 360, *ante*), is of course a different question.

(*y*) *Horsey v. Graham*, L. R. 5 C. P. 9.

(*z*) *Ante*, p. 383, citing *Reeve v. Berridge*, 20 Q. B. Div. 523.

(*a*) *Ante*, pp. 332, 333.

(*b*) 47 & 48 Vict. c. 54.

however, expressly exempts from its scope assignments of leases not exceeding twenty-one years, which are accompanied by actual possession from the making thereof (c). The memorial of an assignment of leaseholds in Middlesex must comply with the regulations laid down in the Act (d), or registration will be refused (e). The equitable assignment by way of mortgage of a lease by deposit has been held, however, not to be within the Act of Anne (f), there being in such a transaction no instrument capable of being registered (g). But though any instrument which carries from one person to another an interest in the land, whether under seal or not, has been held to be a conveyance within the meaning of a statute requiring registration of "all deeds and conveyances" of certain lands (h), the term "assurance" as defined in the Yorkshire Act (i) has received a narrower construction, and will not apply to a mere contract not under seal for the purchase and sale of lands (k). Although at law a second conveyance of property in a register county, even with notice of the first, if first registered would gain priority (l), in equity registration will in general afford no protection against an unregistered assurance of which the party claiming under the registered instrument had notice before the completion of his purchase or security (m).

It has already been stated (n) that the Land Transfer Act, 1897 (o), directs (p) that provision may be made by general rules for applying to dealings with leasehold land the provisions of the Act (q) with respect to compulsory registration (r). With the reservation that nothing in the Act is to render compulsory the registration of the title to a lease having less than forty years to run or two lives yet to fall in (s), such provision has now been made by the Land Transfer Rules, 1903, which direct that the Order in Council (which, together with the approval of the County Council, is required before the Act can be applied to any county

(c) Sect. 28.

(d) 54 & 55 Vict. c. 64, 1st sched.

(e) *R. v. Registrar of Middlesex*, 15 Q. B. 976. See at note (n), p. 332, ante.

(f) 7 Anne, c. 20; ante, p. 332.

(g) *Sumpter v. Cooper*, 2 B. & Ad. 223. It is, however, within sect. 7 of the Yorkshire Act: *Battison v. Hobson*, [1896] 2 Ch. 403 (reported as *In re Hobson*, 44 W. B. 615).

(h) *Credland v. Potter*, L. R. 10 Ch. 8, per Lord Cairns, L. C.

(i) 47 & 48 Vict. c. 54, s. 3.

(k) *Rodger v. Harrison*, [1898] 1 Q. B. 61.

(l) *Doe v. Allsop*, 5 B. & A. 142.

(m) Notes to *Le Neve v. Le Neve*, 2 Wh. & Tud. L. C. 175 (7th ed.), where the cases are collected. But by the Yorkshire Act (s. 14) such protection is only displaced by fraud.

(n) *Ante*, p. 330.

(o) 60 & 61 Vict. c. 65.

(p) Sect. 22.

(q) Sect. 20.

(r) See *Capital and Counties Bank v. Rhodes*, [1903] 1 Ch. 631; *referred to ante*, p. 330.

(s) Sect. 24.

or district) shall, in the absence of anything to the contrary expressed therein, extend to sales of leasehold land (*t*). The effect of an order so made, as regards land in the county or district comprised in the Order, is that an assignment on sale (*u*) of a lease or underlease having at least forty years to run or two lives yet to fall in, executed after the day specified in the Order and capable of registration (*x*), shall operate only as an agreement, and shall not pass any legal estate to the assignee unless or until he is registered as proprietor of the lease or underlease (*y*). The consequence of this rule will be pointed out presently (*z*). By the Land Transfer Act, 1875 (*a*), a separate register is to be kept of leasehold land, and any person (amongst others) who has contracted to buy for his own benefit leasehold land held under a lease (*b*) for a life or lives, or determinable on a life or lives, or for a term of years of which more than twenty-one are unexpired, whether subject or not to incumbrances (*c*), may, provided the vendor consents, apply to be registered as proprietor of such land. The registration of transfers of land once registered has already been adverted to (*d*).

A. *Assignment of Term.*

In order to create the relationship of landlord and tenant between the lessor and the assignee there must have been an actual assignment of his interest on the part of the lessee (*e*). A mere agreement to assign (*f*), or an equitable assignment by deposit of the lease by way of mortgage (*g*), will not create the necessary privity between lessor and assignee so as to make the latter liable as such upon the covenants (*h*) of the lease, even if he have entered into possession and paid rent to the lessor (*i*). Nor can such assignee be compelled, at the suit of the lessor, to take a legal assignment (*k*). So where, a lessee having made an equitable mortgage of his lease, the mortgagee entered into possession and

(*t*) R. 68.

(*u*) Defined in r. 70.

(*x*) See *ante*, p. 330.

(*y*) R. 69. The rule contains a saving clause where assignees are trustees of a settlement for the purposes of the Settled Land Acts.

(*z*) See next paragraph.

(*a*) 38 & 39 Vict. c. 87, s. 11, as amended by r. 67.

(*b*) See section last cited, as amended by 60 & 61 Vict. c. 65, 1st sched.

(*c*) See sect. 18, as amended by 60 & 61 Vict. c. 65, 1st sched.

(*d*) *Ante*, p. 332.

(*e*) As to the covenant by the lessee not to assign, see *ante*, p. 260.

(*f*) *Cox v. Bishop*, 8 D. M. & G. 815; *Friary, &c., v. Breweries v. Singleton*, [1899] 1 Ch. 86 (reversed on appeal, 2 Ch. 261, on facts only).

(*g*) *Moores v. Choat*, 8 Sim. 508; *Robinson v. Rosher*, 1 Y. & C. 7.

(*h*) See *infra*, pp. 417 *et seq.*

(*i*) Cases last cited, notes (*f*) and (*g*); and cf. *ante*, pp. 71, 72.

(*k*) *Moore v. Greg*, 2 Ph. 717.

held adversely to him for a period exceeding that prescribed by the Statute of Limitations, paying rent during the whole time to the lessor, it was held that a person who claimed under the mortgagee by legal assignment, and who had also entered and paid rent to the lessor, was not liable on the covenants of the lease, inasmuch as the effect of the Statute of Limitations (*l*) was (as between the lessee and mortgagee) only to extinguish the title of the former, and not to transfer the lease to the latter (*m*).

It is not necessary, however, for the relationship to be created that possession be taken by the assignee, so that a mortgagee, for instance, of a term by assignment is liable on the covenants (*n*) of the lease (*o*); nor will equity relieve against such liability, even if he has lost his mortgage money (*p*), though it will give no assistance to the lessor (*q*). On the other hand, a mere assignee of the equity of redemption will not be liable as assignee upon the covenants of the lease (*r*). So where a lease was assigned to a trustee for the purpose of securing an annuity, and the trustee claimed rent from the occupiers, it was held that he was liable as an assignee (*s*).

A person, moreover, may become assignee of a lease by taking a general assignment of property in which a term of years is included. Thus a conveyance of all the personal estate (*t*), or personal property (*u*), of a particular individual will be sufficient for this purpose, even though the party taking it do not act specifically accepting the lease (*x*); and this will especially apply to an assignment for the benefit of creditors, which would naturally be an assignment of all the debtor possesses (*y*). The above rule, however, will not hold good if the intention of the parties be clearly otherwise, as where the expression "all other the personal estate" occurs at the end of an enumeration of things which are all chattels personal, and consequently must, by a well-known rule of construction, be confined in its application to things of the same kind—*ejusdem generis*—as those in the enumeration (*z*).

(*l*) 3 & 4 Wm. 4, c. 27, s. 34.

(*m*) *Tichborne v. Weir*, 67 L. T. 735. See comments on this case by the Irish C. A. in *O'Connor v. Foley*, [1906] 1 I. R. 20.

(*n*) See *infra*, pp. 417 *et seq.*

(*o*) *Williams v. Bosanquet*, 1 B. & B. 238 (overruling *Eaton v. Jaques*, 2 Doug. 455); *Stone v. Evans*, Peake, Add. Ca. 91; *Haig v. Homan*, 4 Bli. N. S. 380.

(*p*) *Pilkington v. Shaller*, 2 Vern. 374.

(*q*) *Sparkes v. Smith*, 2 Vern. 275.

(*r*) *Mayor of Carlisle v. Blainie*, 8 East, 487.

(*s*) *Gretton v. Diggles*, 4 Taunt. 766.

(*t*) *White v. Hunt*, L. R. 6 Ex. 32; disapproving *Carter v. Warne*, Moo. & M. 479.

(*u*) *Debenham v. Digby*, 28 L. T. 170.

(*x*) *White v. Hunt*, *supra*.

(*y*) *Ringer v. Cann*, 3 M. & W. 343; *Doe v. Howe*, 9 L. J. Q. B. 352.

(*z*) *Harrison v. Blackburn*, 17 C. B. N. S. 678.

Where an assignment of the kind here spoken of is followed by adjudication in bankruptcy, founded upon such assignment as an act of bankruptcy, the bankruptcy, although (by the doctrine of relation) it has the effect of invalidating the assignment as against the trustee and the creditors, and for all purposes connected with the administration of the lessee's estate, does not operate to release any liability of the assignee in regard to rent (or, as it would seem, to other obligations of the lease) which may have accrued before the adjudication (*a*).

Severance of term.—Whether an assignment by the lessee of his whole interest in *part* of the demised premises (an act by which he is said to “sever” the term) creates a privity of estate between the lessor and assignee in respect of the whole land seems doubtful (*b*). But such an assignment will at all events render the assignee liable for rent (*c*), and upon the covenants (*d*) of the lease which can be apportioned, *e.g.*, the covenant to repair (*e*), in proportion to the share it conveys to him; and similarly where the assignment conveys, not an entire interest in any part, but a partial interest in the whole (*f*). On the other hand, the assignee of part has corresponding rights against the lessor (*g*). It is further provided, in the case of leases made after the year 1881, that notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, all conditions or rights of re-entry contained in the lease shall remain in force with respect to the term in any land as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land as to which the term remains subsisting had alone originally been comprised in the lease (*h*).

Covenants running with the land.—It has next to be considered what are the essential characteristics of the new tenancy, *i.e.*, in respect of what covenants of the lease liability is imposed (and corresponding rights conferred) upon the assignee. For this purpose the covenants of a lease are of two kinds (and conditions stand on the same footing in this respect as covenants (*i*)): those

(*a*) *Stein v. Pope*, [1902] 1 K. B. 595.

(*b*) *Curtis v. Spitty*, 1 Bing. N. C. 756.

(*c*) *Gamon v. Vernon*, 2 Lev. 231.

(*d*) See next paragraph.

(*e*) *Congham v. King*, Cro. Car. 221, where liability was enforced against an assignee of such assignee.

(*f*) *Merceron v. Dowson*, 5 B. & C. 479; *Norval v. Pascoe*, 34 L. J. Ch. 82.

(*g*) *Simpson v. Clayton*, 4 Bing. N. C. 758.

(*h*) 44 & 45 Vict. c. 41, s. 12. See *infra*, p. 439, where the section is set out textually.

(*i*) *Horsey Estate v. Steiger*, [1899] 2 Q. B. 79; *Stevens v. Copp*, L. R. 4 Ex. 20, per Martin, B. This would seem to entail the somewhat curious result that

which touch and concern the thing demised (usually spoken of as "running with the land"), and those which are merely personal to the covenantor (usually spoken of as "collateral"). It has been said that, as a general principle, a covenant ought to run with the land, if it is of such a nature that it directly affects the use of the demised premises in a manner which the lessor chooses to assume will be beneficial to him (*k*).

The former include, besides all implied covenants (*l*), all express covenants touching the thing demised if relating to something *in esse* at the time of the demise (*m*), and (where assigns are expressly named in the covenant) even if relating to something not *in esse* at that time (*n*). But to make the naming of assigns necessary, the covenant must be an absolute covenant to do a new thing relating to the demise, for a covenant to do something conditionally (*e.g.*, to repair buildings if erected during the term) binds the assignees, as it has been held, even without their being named (*o*). Moreover, in order to make a covenant run with the land at common law, it is not sufficient that it concern the land, for there must also be a privity of estate between the covenanting parties (*p*). It must be entered into with a person having an estate or interest in the land (*q*), and when so entered into only enures during that estate (*r*): so that a covenant entered into by a lessee with the owner of, and a person having no estate in, the immediate reversion jointly would seem not to be a covenant running with the land so as to bind an assignee (*s*). In equity, however—and now the rule would apply in all courts—where a covenant was clearly made for the benefit of certain land with a person who in the contemplation of such a court was the true owner of it, it would be regarded as annexed to and running with that land (*t*).

the interest taken by the assignee in a case like the one last cited—referred to *infra*, p. 424—is less precarious than that of the lessee, for the latter of course (subject now to the Conveyancing Act) may be made liable to forfeiture on breach of covenant of any kind.

(*k*) *White v. Southend Hotel Co.*, [1897] 1 Ch. 767, per Rigby, L. J.

(*l*) *Spencer's case*, notes to 1 Sm. L. C. 55, at p. 68 (11th ed.). (As to implied covenants, see *ante*, pp. 140 *et seq.*)

(*m*) *Id.* (1st resolution), 5 Co. 16 a; 1 Sm. L. C. 55.

(*n*) *Id.* (2nd resolution). Cf. *Doughty v. Bouman*, 11 Q. B. 444, per Parke, B.

(*o*) *Minshull v. Oakes*, 2 H. & N. 793, where the doctrine of the assignee's

liability being dependent on his being named in the covenant is disapproved of. The same view is taken in 1 Sm. L. C. 72 (11th ed.).

(*p*) *Webb v. Russell*, 3 T. R. 393, per Lord Kenyon, C. J.; *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608; *Deuar v. Goodman*, [1907] 1 K. B. 612, per Jelf, J.

(*q*) *Rogers v. Hosegood*, [1900] 2 Ch. 388, per Farwell, J.

(*r*) Notes to *Spencer's case*, 1 Sm. L. C. at p. 75.

(*s*) *Id.*, questioning *Wakefield v. Brown*, 9 Q. B. 209, and *Magnay v. Edwards*, 13 C. B. 479.

(*t*) *Rogers v. Hosegood*, *supra* (C. A.).

As regards collateral covenants, though these do not in general affect assignees, they may incur liability in respect of them by reason of the equitable doctrine of notice (*u*).

The following covenants, amongst others, have been considered to run with the land (*x*):—On the part of the lessor, covenants for title or quiet enjoyment (*y*), for further assurance (*z*), for renewal (*a*), to allow in certain events deductions to be made from the rent (*b*), to pay on a valuation at the end of the term for improvements to be executed on the premises by the lessee (assigns being named) (*c*), to construct a new street bounding the premises on one side (assigns being named) (*d*), and to supply the demised premises with water at a certain price (*e*). On the part of the lessee may be specified—covenants to pay rent (*f*) and (assigns being named) rates, taxes, and other impositions (*g*); to repair (*h*), to put or to leave in repair (*i*), and to repair tenant's fixtures and machinery fixed to the premises (not being mere utensils or movable chattels) (*j*); to build (*k*); to manure (*l*), or to cultivate lands in a particular manner (*m*); to insure (*n*); not to carry on a

(*u*) *Infra*, p. 424.

(*z*) See 1 Sm. L. C. 68, 69. Some of the cases here cited relate to assignments of the reversion, but, as will be seen *infra* (p. 433), the principle is as a rule the same, and they are here all classed together for the sake of convenience.

(*y*) *Williams v. Burrell*, 1 C. B. at p. 433; *Campbell v. Lewis*, 3 B. & A. 392 (affirming *Lewis v. Campbell*, 8 Taunt. 715); *Noke v. Awdler*, Cro. Eliz. 436; *Manchester, &c., Ry. Co. v. Anderson*, [1898] 2 Ch. 394.

(*c*) *Midlemore v. Goodale*, Cro. Car. 503.

(*a*) *Richardson v. Sydenham*, 2 Vern. 447; *Furnival v. Crew*, 3 Atk. at p. 88; *Simpson v. Clayton*, 4 Bing. N. C. 758. See *Woodall v. Clifton*, [1905] 2 Ch. 257. In *Muller v. Trafford*, [1901] 1 Ch. 54 (cited *infra*, p. 433), it was held that a covenant in an underlease to grant an extension of term if one were obtained from the head landlord did not run with the land. *Sed qu.*

(*b*) *Baylye v. Hughes*, Cro. Car. 137; *White v. Southend Hotel Co.*, [1897] 1 Ch. 767.

(*c*) See *Grey v. Cuthbertson*, 2 Chit. 482; *Gorton v. Gregory*, 3 B. & S. 90 (reported as *Gorton v. Gregory*, 31 L. J. Q. B. 302), per Willea, J. And *cp. Mansel v. Norton*, 22 Ch. Div. 769.

(*d*) *Morris v. Kennedy*, [1896] 2 I. R. 247. The illustration given by Bayley, J., in *Mayor of Congleton v. Pattison*, 10 East, 130, of a somewhat similar covenant, to make a waterway from demised premises through other lands in order to facilitate access to a market, as being collateral, can hardly (it is thought) be regarded as correct; at all events unless put on the ground (*supra*, p. 418) of assigns not being named.

(*e*) *Jourdain v. Wilson*, 4 B. & A. 266.

(*f*) *Holford v. Hatch*, 1 Doug. 183, per Lord Mansfield, C. J. See Platt on Covenants, p. 195.

(*g*) *Wiz v. Rutson*, [1899] 1 Q. B. 474.

(*h*) *Spencer's case*, 1 Sm. L. C. 55 (6th resolution); *Dean of Windsor's case*, 5 Co. 24 a; *Williams v. Earle*, L. R. 3 Q. B. 739.

(*i*) *Matures v. Westwood*, Cro. Eliz. 599, 617; *Martyn v. Clue*, 18 Q. B. 661. Cf. *Plummer v. Johnson*, 18 T. L. R. 316; cited *infra*, p. 428.

(*j*) *Williams v. Earle*, *supra*.

(*k*) *London (City of) v. Nash*, 3 Atk. 512.

(*l*) *Sale v. Kitchingham*, 10 Mod. 158.

(*m*) *Cockson v. Cock*, Cro. Jac. 125. See now, as to such covenants, 6 Edw. 7, c. 56, s. 3 (1); *ante*, p. 294.

(*n*) *Vernon v. Smith*, 5 B. & A. 1, per Best, J.

particular trade (*o*); to reside on the demised premises (*p*); not to assign without licence (if assigns be named (*q*), and, as it would seem, even if assigns be not named (*r*)); to permit the lessor to have free passage to parts of a house excepted from the demise (*s*); to leave the land as well stocked with game at the end of the term as at the beginning (*t*); to conduct the business of an inn-keeper on the demised premises in such proper manner as not to imperil the licence (*u*), and (in a lease from brewers or wine merchants) not to sell liquors other than those purchased from the lessors (*x*); to grind at the lessor's mill all such corn as should grow upon the demised land (the mill having passed with the reversion) (*y*); a covenant (naming assigns) in a lease of mines to build a new smelting mill and keep it in repair for working them (*z*); a covenant—following on a general covenant not to use the demised premises for any trade or business—that in case they should at any time be used for immoral purposes the lessee or his assigns should pay to the reversioners a stipulated sum by way of liquidated damages (assigns being named) (*a*); a covenant not to remove produce and to expend on the land all crops grown thereon (*b*), and a covenant (naming assigns) to construct a railway over the demised land and to carry thereon coals gotten out of an adjoining colliery (*c*).

Moreover, whether a covenant in its essence directly "concern" the land or not, it may happen that a statute applies to and regulates its operation in such a way as to cause it to become a covenant running with the land. Thus, where premises are situated within the bills of mortality, a statute already noticed (*d*) entitles the landlord to have insurance moneys paid in respect of them laid out on the land, and consequently the tenant's covenant

(*o*) *Mayor of Congleton v. Pattison*, 10 East, 130, per Lord Ellenborough, C. J., and Bayley, J.

(*p*) *Tatem v. Chaplin*, 2 H. Bl. 133.

(*q*) *Williams v. Earle*, *supra*. *McEacharn v. Colton*, [1902] A. C. 104.

(*r*) 1 Sm. L. C. 73. (The point is described as a doubtful one by Bayley, J., in *Paul v. Nurse*, 8 B. & C. 486.) On the other hand, a covenant not to assign at all (whether with or without licence) has been said to be one not running with the land: *Williams v. Earle*, *supra*, per Blackburn, J.

(*s*) *Cole's case*, 1 Salk. 196.

(*t*) *Hooper v. Clark*, L. R. 2 Q. B. 200.

(*u*) *Fleetwood v. Hull*, 23 Q. B. D. 35.

(*x*) *Clegg v. Hands*, 44 Ch. Div. 503;

White v. Southend Hotel Co., [1897] 1 Ch. 767; *Manchester Brewery Co. v. Coombe*, [1901] 2 Ch. 608.

(*y*) *Vyryan v. Arthur*, 1 B. & C. 410. *Cp. Coker v. Guy*, 2 B. & P. 565.

(*z*) *Easterby v. Sampson*, 6 Bing. 644 (affirming *Sampson v. Easterby*, 9 B. & C. 505).

(*a*) *Howard de Walden (Lord) v. Barber*, 19 T. L. R. 183.

(*b*) See *Clegg v. Hands*, *supra*; *Chapman v. Smith*, [1907] 2 Ch. 97. See now, as to such covenants, *ante*, p. 294.

(*c*) *Hemingway v. Fernandes*, 13 Sim. 228. See on this case, note (*p*), *infra*.

(*d*) 14 Geo. 3, c. 78, s. 83; *ante*, p. 241.

to insure in such case runs with the land (*e*). In the same way, inasmuch as on the tenant's bankruptcy his estate vests in his trustee (*f*), a clause of re-entry in the lease in the event of bankruptcy resolves itself, like the covenant against assignment (*g*), into a stipulation as to the occupation of the demised premises, and therefore also runs with the land (*h*). And for the purpose of this rule it is sufficient if in consequence of the statute the act relied upon will, in the ordinary course of events, involve dealing with the interest in, or possession of, the premises (*h*). Thus a clause of re-entry in a lease to a company in the event of entering into liquidation runs with the land; for though there is no vesting of the premises in the liquidators, yet they are empowered (*i*) to sell or transfer the whole of the company's property (*k*).

To run with the land, covenants must either affect the land itself—*i.e.*, the nature, quality, or value of the thing demised, independently of collateral circumstances (*l*)—during the term (*e.g.*, those which regard the mode of occupation), or they must be such as *per se*, and not merely from collateral circumstances, affect the value of the land at the end of the term (*m*). This has also been expressed by saying that to run with the land a covenant must *necessarily* affect the nature, quality, or value of the thing demised, independently of collateral circumstances, or affect the mode of enjoyment (*n*). "No covenant or condition" (it has been said) "which affects merely the person, and which does not affect the nature, quality, or value of the thing demised, or the mode of using or enjoying the thing demised, runs with the land" (*o*).

Covenants run with the land only in demises under seal (*p*). But if upon an assignment under a parol yearly demise rent has been paid by the assignee to the landlord and received without objection, an inference of fact may be drawn from such payment, and from notice to quit not being given, that an agreement has

(*e*) *Vernon v. Smith*, 5 B. & A. 1.

(*f*) 46 & 47 Vict. c. 52, s. 54.

(*g*) *Supra*, p. 420.

(*h*) See per Lord Russell, C. J., in next-cited case.

(*i*) See 25 & 26 Vict. c. 83, ss. 95, 133.

(*k*) *Horsey Estate v. Steiger*, [1899] 2 Q. B. 79. It may be noticed, too, that the right of distress upon the land in such a case is seriously interfered with: see *post*, p. 527. As to the chief points of resemblance and difference between bankruptcy and winding-up, see *Fryer v. Ewart*, [1902] A. C. 187, per Lord

Lindley (reported as *Watney v. Ewart*, 86 L. T. 242).

(*l*) Per Lord Ellenborough, C. J., in next-cited case.

(*m*) *Mayor of Congleton v. Pattison*, *supra*, per Bayley, J.

(*n*) *Dewar v. Goodman*, [1907] 1 K. B. 612, per Jelf, J., cited *infra*, p. 423.

(*o*) *Horsey Estate v. Steiger*, *supra*.

(*p*) *Elliott v. Johnson*, L. R. 2 Q. B. 120. (See per Lush, J.) In *Hemingway v. Fernandes*, 13 Sim. 228, if the "articles of agreement" were not under seal, this point was not taken.

been come to between them to go on upon the same terms as before (*q*). For this, however, payment of rent or some other act definitely showing a recognition of the new tenancy as subsisting is necessary (*r*). It does not appear ever to have been decided how far this doctrine would apply in the case of a letting not by deed for a term of years—*e.g.*, in the ordinary case of a three years' agreement in writing—where of course there could, during the subsistence of the term, be no question of notice to quit. In consequence of this it seems difficult to see how, if the term were assigned, a similar promise on the part of the assignee to abide by the provisions of the original contract could, as against him, be implied in favour of the lessor, even though possession had been taken by the assignee and recognized by the latter. But, as it would seem, the benefit of a stipulation in a parol demise (as distinguished from the burden) could now enure as a chose in action to the assignee of the term by virtue of the provisions (*s*) of the Judicature Act (*t*).

Collateral covenants.—On the other hand, as already stated, collateral covenants (apart from the doctrine of notice (*u*)) neither confer rights nor impose liabilities upon the assignee; and this even if the covenant expressly extend to them (*x*). Thus, where personal chattels form part of a demise, *e.g.*, in a lease of land with live stock (*y*), a covenant to deliver up the stock at the end of the term does not run with the land so as to bind an assignee, even if named (*z*). So, in a demise of premises with chattels thereon, a covenant by the lessee to renew them when worn out or destroyed, he being paid on a valuation at the end of the term, does not run with the land (*a*). Where, too, the lessee of a theatre undertook, in consideration of a money loan, to allow the lender the free use until repayment of a certain number of unspecified boxes, it was held that this was a mere collateral covenant, as it passed no interest in any specific part of the land (*b*).

(*q*) *Buckworth v. Simpson*, 1 C. M. & R. 834. Cf. *infra*, p. 431.

(*r*) *Elliott v. Johnson*, *supra*.

(*s*) Sect. 25, sub-s. (6) of 36 & 37 Vict. c. 66.

(*t*) See *Manchester Brewery Co. v. Combs*, [1901] 2 Ch. 608, per Farwell, J.; *Torkington v. Magee*, [1902] 2 K. B. 427 (reversed, C. A., on another point, [1903] 1 K. B. 644).

(*u*) *Infra*, p. 424.

(*x*) *Spencer's case*, 5 Co. 16 a (2nd resolution); 1 Sm. L. C. 55.

(*y*) See *ante*, p. 18.

(*z*) *Spencer's case*, 5 Co. 16 a (3rd resolution). It will be noticed that the covenant here in question was not a covenant to keep the stock on the land: see *Hooper v. Clark*, L. R. 2 Q. B. at p. 201, per Blackburn, J.

(*a*) *Gorton v. Gregory*, 3 B. & S. 90 (reported as *Garton v. Gregory*, 31 L. J. Q. B. 302).

(*b*) *Flight v. Glossopp*, 2 Bing. N. C. 125.

The following are further illustrations of such covenants or agreements (c):—On the part of the lessor, a covenant in the lease of a public-house not to open a similar house within a certain distance (d); a covenant to give the lessee of premises the right of pre-emption of other adjoining property of the lessor (e); and an undertaking by which a tenant, on giving up possession at a prescribed date, is to receive, amongst other payments, one for hay and straw at a higher than the customary price (f). A covenant by the lessor of an underlease to perform the covenants of the head lease, or to indemnify his lessee, belongs also to this class (g), where the covenant which is broken (like one to build houses on the demised land) is itself (assigns not being named) collateral to the underlease (h). The same thing has even been held to apply where, the underlease extending only to a part of the premises included in the head lease, the covenant (though expressed to include assigns) was to perform the covenants of the head lease (and to indemnify) so far as they related to the other part, because, although the head lease contained a clause of re-entry on which forfeiture was enforced both of lease and underlease, and the possession of the land therefore affected (i), the forfeiture was not the direct and necessary consequence of the breach of covenant (k). So a covenant for himself, his heirs, executors, administrators, and assigns, by a lessor (who at the time of the lease has commenced to sow the demised lands with grass), that he, his heirs or assigns will before a certain date completely finish laying down a specified proportion of them in good grass, if qualified by a subsequent stipulation in the lease that no covenant or provision whatever should be implied therein on the part of either of the parties, does not run with the reversion; for the effect of such a stipulation, by excluding the implication of an agreement by him to continue laying down the grass, and of an authority to him from the lessee to enter on the lands for that purpose, is to

(c) See note (x), p. 419, *supra*.

(d) *Thomas v. Hayward*, L. R. 4 Ex. 311.

(e) *Collison v. Lettsom*, 6 Taunt. 224.

(f) *Phillips v. Miller*, L. R. 10 C. P. 420.

(g) *Doughty v. Bowman*, 11 Q. B. 444.

(h) *Supra*, p. 418. And this notwithstanding the fact that the covenant to build in the head lease was entered into by the lessee for himself and his assigns,

and was therefore not collateral to that lease.

(i) Cf. *supra*, p. 421.

(k) *Dewar v. Goodman*, [1907] 1 K. B. 612. The underlease contained also a proviso that the covenants and the indemnity on the part of the lessor were entered into and given by him with the intention of binding him only whilst he continued to hold the reversion, and of binding, so far as could be, any other person or persons for the time being entitled to such reversion.

prevent the inference that he has agreed to do anything on the land in fulfilment of the apparent intention of the covenant, and to convert the obligation into a mere warranty binding him personally (*l*).

On the part of the lessee may be mentioned an agreement to pay an annual sum to a third party (*m*); a covenant not to lop trees excepted out of the demise (*n*); an undertaking to pay a certain sum by way of additional rent in respect of improvements or enlargements of the premises made by the lessor (*o*); a covenant in a lease of premises for a silk-mill to employ only a certain class of persons in the works to be carried on (*p*); a covenant to indemnify the parish in which the premises are situated from charges incurred in the maintenance of paupers gaining a settlement therein by reason of the lessee's acts (*q*); a covenant to pay taxes chargeable upon the lessor in respect of premises other than those demised (*r*); and an undertaking to permit the lessor to re-enter in case of the lessee being convicted of any offence against the game laws (*s*).

Equitable doctrine of notice.—By reason, however, of the equitable doctrine of notice, the assignee may stand on the same footing with regard to collateral covenants (*t*) as with regard to those which actually concern the land demised,—and this, apparently, even in regard to covenants entered into *dehors* the lease, and not with the lessor but with a third person (*u*); as the question then whether the covenant runs with the land or not, or whether it is covenant or mere agreement (*x*), becomes immaterial (*y*). This doctrine is founded on the principle, that if an equity is attached to property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased (*y*); and, as has already been mentioned (*z*), it applies

(*l*) *Eccles v. Mills*, [1898] A. C. 360.

(*m*) *Mayho v. Buckhurst*, Cro. Jac. 438.

(*n*) *Raymond v. Fitch*, 2 C. M. & R. 588.

(*o*) *Lambert v. Norris*, 2 M. & W. 333.

(*p*) *Mayor of Congleton v. Pattison*, 10 East, 130.

(*q*) *Walsh v. Fussell*, 6 Bing. 163.

(*r*) *Gower v. Postmaster-General*, 57 L. T. 527.

(*s*) *Stevens v. Copp*, L. R. 4 Ex. 20.

(*t*) So far, that is, as concerns liability to an injunction to prevent him from taking irrespective of such covenants. As regards this liability, he stands in the same position as the covenantor

himself, so that substantial damage need not be proved (*Richards v. Revitt*, 7 Ch. D. 224). But of course it does not follow that all the same remedies are applicable as in the case of covenants running with the land, e.g., a condition of re-entry (*supra*, p. 417, at note (*i*); and *cp. Holloway v. Hill*, [1902] 2 Ch. 612, cited *infra*, with *Villiers v. Oldcorn*, 20 T. L. R. 11, cited *ante*, p. 318).

(*u*) *Luker v. Dennis*, 7 Ch. D. 227. *Sed qu.*

(*x*) See *supra*, p. 421.

(*y*) *Tulk v. Moxhay*, 2 Ph. 774, per Lord Cottenham, L. C.

(*z*) *Ante*, p. 137.

equally where the purchase is by way of underlease as where it is by way of assignment (*a*). It applies even to the case of a mere occupier; for if a person by the leave of another who is bound by a covenant as to the use of land enters into possession with notice of the obligation, he will be restrained from violating that covenant (*b*). It follows that (as already stated (*c*)) the lessee of a person bound by such a covenant is equally bound by it himself: nor does it make any difference that the original covenant is expressed to extend only to the executors, administrators, "and assigns" of the covenantor (*d*).

It is, however, well established that the rule only extends to negative covenants, *i.e.*, those which restrict the user of the land (*e*), and not to those, like the covenant to repair, which can only be performed by a money expenditure (*f*); though the mere fact that such expenditure may indirectly ensue—*e.g.*, in a covenant by a publican to purchase all beer from his lessors—will not prevent the doctrine from applying, if, as in the case of such a covenant, its real effect be negative, or at least if it contain a negative element which can be enforced against the lessee (*g*). Where, for instance, a lease contained a covenant by the lessee not to carry on or permit to be carried on a certain class of trades on the premises, it was held that the above doctrine did not extend to fix with liability an underlessee for further sub-letting to a person who, without proof of his consent thereto (*h*), committed a breach of the covenant, inasmuch as his only means of preventing the prohibited act was by taking active proceedings against his tenant (*i*). Moreover, it is now settled that the rule in question only applies to covenants entered into with a covenantor in respect of some ascertainable property belonging to him or in which he is interested (*k*), and consequently not (as it would appear) (*l*) to a case where the

(*a*) *John Brothers, &c., Co. v. Holmes*, [1900] 1 Ch. 188. The cases cited under this head relate to both classes of instruments.

(*b*) *Mander v. Falcke*, [1891] 2 Ch. 551.

(*c*) *Ante*, p. 263.

(*d*) *Holloway v. Hill*, [1902] 2 Ch. 612 (where the covenant was by the lessor); *Teape v. Douse*, 92 L. T. 319.

(*e*) See *Austerberry v. Corporation of Oldham*, 29 Ch. Div. 750. See further on the origin and application of the rule *In re Nisbet and Potts*, [1905] 1 Ch. 391 (reported as *In re Nesbit and Potts*, 74 L. J. Ch. 310), per Farwell, J.; *affd.*, C. A., [1906] 1 Ch. 386.

(*f*) See *Haywood v. Brunswick, &c.*,

Society, 8 Q. B. Div. 403, per Lindley, L. J.; *L. & S. W. Ry. Co. v. Gomm*, 20 Ch. Div. 562.

(*g*) *Clegg v. Hands*, 44 Ch. Div. 503.

(*h*) As to grounds for implying such consent, see *Jaeger v. Mansions Consolidated*, 87 L. T. 690, at pp. 693-4, per Buckley, J.

(*i*) *Hall v. Ewin*, 37 Ch. Div. 74.

(*k*) Per Romer, L. J., in next-cited case.

(*l*) The actual decision was that the rule did not apply to entitle the executor of the covenantor to an injunction against an assign of the covenantor in respect of a breach of the covenant committed after the covenantor's death.

assignor parts with his whole estate (*m*); for the covenant in such event is personal and collateral (*n*).

It is to be observed that actual notice for the above purpose is not necessary, and that constructive notice will be sufficient (*o*). And inasmuch as every person who acquires a leasehold interest in premises—even a tenancy from year to year (*p*)—is bound to make a reasonable investigation of title (*q*), constructive notice will be imputed to him of any covenant contained in a deed forming part of the chain of title of his assignor or lessor (*r*): though not of a covenant contained in a separate deed (*s*) (*i.e.*, a deed not noticed either by way of recital or by being referred to in the deed of conveyance (*t*)), or of a covenant contained in a document which reasonably careful inquiry has failed to discover (*u*). Thus, for instance, an underlessee has constructive notice of the covenants of the head lease where the underlessor, on the face of the underlease, appears himself to be holding under a lease (*x*). So the underlessee of a person who, on taking an assignment from the original lessee, has covenanted not to carry on a particular trade on the demised premises, will be restrained from carrying it on, even though such covenant may not have been contained in the original lease, but only in the assignment, and though he had no notice of it when he took his underlease; and so will an assignee of such underlessee (*y*).

The above rule, it should be observed, as to constructive notice is not altered by the provisions as to title contained in the Vendor and Purchaser Act, or the Conveyancing Act (*z*); for their only effect is that a lessee or assignee is now in the same position with regard to notice as if he had formerly stipulated expressly not to

(*m*) *Formby v. Barker*, [1903] 2 Ch. 539.

(*n*) *Id.*, per Vaughan Williams, L. J. The deed in this case was not executed by the covenantors, so that as between them and their covenantee there was no covenant which could be enforced at law.

(*o*) See *ante*, p. 137.

(*p*) *Wilson v. Hart*, L. R. 1 Ch. 463.

(*q*) *Patman v. Harland*, 17 Ch. D. 353, per Jessel, M. R.

(*r*) *Id.*; *Wilson v. Hart*, *supra*; *Feilden v. Slater*, L. R. 7 Eq. 523 (reported as *Fielden v. Slater*, 38 L. J. Ch. 379); *Thornevell v. Johnson*, 50 L. J. Ch. 641 (where, however, the decision seems to be put on a different ground); *L. C. & D. Ry. Co. v. Bull*, 47 L. T. 413.

(*s*) *Carter v. Williams*, L. R. 9 Eq. 678.

(*t*) *Patman v. Harland*, *supra*, per Jessel, M. R.

(*u*) *Parker v. Whyte*, 1 H. & M. 167. And see 45 & 46 Vict. c. 39, s. 3, which "really does no more than state the law as it was before, its negative form" showing "that a restriction rather than an extension of the doctrine of notice was intended by the legislature": *Bailey v. Barnes*, [1894] 1 Ch. 25, per Lindley, L. J.; *Holloway v. Hill*, [1902] 2 Ch. 612.

(*x*) *Tritton v. Bankart*, 56 L. T. 306. Cp. *Ebbells v. Conquest*, [1895] 2 Ch. 377, cited *ante*, p. 233.

(*y*) *Clements v. Welles*, L. R. 1 Eq. 200.

(*z*) See *ante*, p. 347.

inquire into his lessor's or assignor's title (*a*). Nor, when constructive notice can be imputed, will its effect be destroyed even by an express representation on the part of the lessor or assignor that there is no restrictive covenant in existence (*b*).

The result of the whole seems to be that the assignee of the term will be bound by the following classes of covenants: (*a*) All covenants running with the land. (*β*) Any other covenants of a negative or restrictive nature contained in the lease, or in any document forming part of the chain of title, inasmuch as he has at least constructive notice of their existence (*c*). (*γ*) All other covenants of a restrictive kind, of which he has actual notice, relating to the user of the demised premises, and entered into by the lessee either under or *dehors* the lease, and either with the lessor or with a third person (*d*).

On the other hand, the assignee of the term may, as against the lessor, take advantage of (*a*) all covenants running with the land, and probably (*β*) any other covenants of a restrictive kind relating to the property which have been entered into by the lessor for the benefit of the lessee, and in consideration of which he may be presumed to have obtained an increased rent (*e*).

Duration of liability:—(*a*) *As between lessor and assignee.*—The liability of the assignee (*f*) to the lessor being founded wholly upon privity of estate—and each successive assignee stands in this respect upon the same footing—it obtains as long as his estate lasts and no longer. With regard, therefore, to rent, he is only liable for instalments which have fallen due before any re-assignment by him (*g*) (as well as, by force of the Apportionment Act, for rent apportioned down to the time of the re-assignment (*h*)): for by such re-assignment he gets rid of his liability (*i*), even if he re-assign to a "man of straw" for the express purpose of getting rid of it (*k*), and even if any assignment without the lessor's

(*a*) *Patman v. Harland*, *supra*; *Morridge v. Clapp*, [1892] 3 Ch. 382, per Kay, L. J.; *Imray v. Oakshette*, [1897] 2 Q. B. 218, per Rigby, L. J.

(*b*) *Patman v. Harland*, *supra*; *Hooper v. Bromet*, 89 L. T. 37. (There was no appeal in the last-cited case upon this point.)

(*c*) *Supra*, p. 426.

(*d*) *Luker v. Dennis*, cited *supra*, p. 424.

(*e*) See *Clegg v. Hands*, 44 Ch. Div. 503, cited *infra* (p. 435), this being the converse case.

(*f*) As to liability of the lessee after assignment, see *ante*, pp. 162, 219.

(*g*) *Treackle v. Coke*, 1 Vern. 165; *Chancellor v. Pools*, 2 Doug. 764; *Barnfather v. Jordan*, *id.*, 452.

(*h*) *Swansea Bank v. Thomas*, 4 Ex. D. 94; *Hopkinson v. Lovering*, *infra*. See the question of liability for apportioned rent in the case of assignment discussed *ante*, pp. 124, 125.

(*i*) *Pitcher v. Torey*, 1 Salk. 81.

(*k*) *Taylor v. Shum*, 1 B. & P. 21; *Jekeux v. Nash*, 2 Str. 1221.

consent is forbidden by the terms of the lease (*l*). Nor will the Court, in the exercise of its equitable jurisdiction, interfere in such a case (*m*), unless the re-assignment is merely collusive and unreal (*n*), and the person to whom he re-assigns is in truth nothing but a mere agent or manager to himself (*o*). And where the assignee has re-assigned, the mere fact that the person to whom he re-assigns has not entered or taken possession (*p*), or that the instrument of re-assignment has not been actually delivered to him (*e.g.*, where it has remained in the hands of the assignee's solicitor, who claims a lien upon it for the expense of preparing it (*q*)), makes no difference in the above respect.

With regard to other covenants also a similar principle applies. Thus the assignee is not liable for breaches of the covenant to repair committed after he has re-assigned (*r*), though if committed before such re-assignment it is immaterial that the action is only commenced afterwards (*s*). So where, for instance, a lessee failed to observe a covenant to execute certain repairs within a specified time, and after the expiration of that time assigned over, it was held that the assignee was not liable (*t*), even where the lessee had covenanted for his assigns as well as for himself (*u*). The covenant to repair and keep in repair, however, being, as already observed (*x*), a continuing covenant, the mere fact that the premises were out of repair at the time of the assignment affords no defence to an assignee, even though he may have re-assigned before action (*y*).

(On the other hand, as regards his correlative right, the assignee of the lessee can in no case sue the lessor or his successors in interest for a breach of covenant committed by the lessor and complete before the assignment to himself (*z*).)

(b) *As between lessee and assignee.*—As between lessee and assignee, the former has been said to be in the nature of a surety for the latter (*a*); hence a lessee who has been called upon to pay rent to the lessor (*b*) can sue the assignee, provided such rent has

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| (l) <i>Paul v. Nurse</i> , 8 B. & C. 486. | (s) <i>Harley v. King</i> , 2 C. M. & R. 18. |
| (m) <i>Valliant v. Dodemede</i> , 2 Atk. 546; | (t) <i>St. Saviour's (Churchwardens of) v.</i> |
| <i>Onslow v. Corrie</i> , 2 Madd. 330; <i>Fagg v.</i> | <i>Smith</i> , 1 W. Bl. 351; 3 Burr. 1271. |
| <i>Dobie</i> , 3 Y. & C. Ex. 96. | (u) <i>Grescot v. Green</i> , 1 Salk. 199. |
| (n) See <i>Hopkinson v. Lovering</i> , 11 | (x) <i>Ante</i> , p. 218. |
| Q. B. D. 92, at p. 97. | (y) <i>Plummer v. Johnson</i> , 18 T. L. R. |
| (o) <i>Philpot v. Hoare</i> , Amb. at p. 485; | 316. |
| 2 Atk. 219. | (z) <i>Morris v. Kennedy</i> , [1896] 2 I. R. |
| (p) <i>Walker v. Reeve</i> , 3 Doug. 19. | 247. Cf. <i>infra</i> , p. 436. |
| (q) <i>Odell v. Wake</i> , 3 Camp. 394. | (a) Per Lord Denman, C. J., in next- |
| (r) <i>Beardman v. Wilson</i> , L. R. 4 C. P. | cited case. |
| 57. | (b) See <i>ante</i> , p. 162. |

fallen due during the continuance of the latter's interest and not afterwards (*c*). But where occupation was had under an invalid assignment from a lessee by a person who was never accepted as tenant by the lessor, it was held that the lessee could not recover from him rent which accrued due after he had ceased to occupy, and which he himself was compelled to pay to the lessor (*d*). And payment of the rent by an assignor does not create in his favour a lien on the term in the hands of an assignee, so that he cannot complain on that ground of a subsequent assignment (*e*).

It follows, too, from the above principle, that where the lessor recovers damages against the lessee for breaches of the covenant to repair committed during the holding of the assignee, the latter is liable to the lessee, because a duty is imposed on him (without express covenant) to perform the covenants of the lease (*f*). And this principle has been held to extend to the case of a mere equitable assignee (*g*). So a party who accepts the benefit of an assignment of leaseholds is liable to the covenants on his part contained in the deed although he does not execute it (*h*). It applies too, as well to subsequent assignees as to the first, with regard to breaches of the covenant committed during the continuance of their interest, for the lessee is, in effect, a surety for each of them to the lessor (*i*); nor does it make any difference in such a case that each of them may have expressly covenanted to indemnify his immediate assignor against *all* subsequent breaches, for his obligation towards the original lessee is not affected by any covenants he may have entered into with such assignor (*k*). But even where there exists—as is usually the case in assignments (*l*)—an express covenant of indemnity to the assignor (whether the lessee or a mesne assignee), the Court will only direct payment on account of breaches of covenant already committed, and will not make a general declaration of the assignor's right to indemnity, with liberty to him to apply from time to time in case of future breach (*m*). It may be added

(*c*) *Wolveridge v. Steward*, 1 Cr. & M. 644. Of course, if the lessee, as usually happens, takes an express covenant of indemnity from the assignee, the above proviso no longer applies: see *Staines v. Morris*, 1 V. & B. 8, cited *infra*.

(*d*) *Crouch v. Tregonning*, 1. B. 7 Ex. 88.

(*e*) *In re Russell*, 29 Ch. Div. 254. See also *Seaward v. Drew*, 67 L. J. Q. B. 322, per Channell, J.

(*f*) *Burnett v. Lynch*, 5 B. & C. 589.

(*g*) *Ciose v. Wilberforce*, 1 Beav. 112, explained in *Nokes v. Fish*, 3 Drew. 735.

But cf. *supra*, p. 415, and *infra*, at note (*o*).

(*h*) *Willson v. Leonard*, 3 Beav. 373.

(*i*) *Wolveridge v. Steward*, *ubi sup*.

(*k*) *Moule v. Garrett*, 1. R. 7 Ex. 101.

A tenant by elegit (as to whose interest see *infra*, p. 448) is not within the above rule, for he only takes the interest of the lessee for a limited purpose and for a limited time, viz. until he obtains satisfaction of his judgment: *Johns v. Pink*, [1900] 1 Ch. 296.

(*l*) See *Staines v. Morris*, 1 V. & B. 8.

(*m*) *Lloyd v. Dimmack*, 7 Ch. D. 398.

that where the assignee, as usually happens, undertakes by this covenant to observe and perform the obligations of the lease, its real object is merely to indemnify and protect the assignor against the consequence of any breaches of them, and that it will not entitle him as of right to enforce, as against the assignee, the observance of those of a negative character by injunction (*n*).

A mortgagee, however, by sub-demise from an assignee is not liable, though in possession, to indemnify the lessee for rent paid by the latter to avoid a forfeiture; nor is it material that by the contract *between the parties* contained in the mortgage deed it be provided that if the mortgagee take possession he will pay the rent reserved by the lease (*o*). For the general principle above spoken of only applies as between parties under a common liability to discharge the obligation discharged by one of them (*p*), or at all events (by regard to an equitable doctrine) having a community of interest in the subject-matter to which the burden is attached which has been enforced against one of them, coupled with benefit to the other (*q*); and the mortgagee has no such interest in the lease or benefit from the payment of the rent as to bring him within that doctrine (*q*).

Where a proposed assignee agreed to enter into a covenant of indemnity, and took possession without any assignment having been executed, it was held that the assignor, some of whose goods left on the premises had been distrained for rent (*r*), was entitled to recover against him in respect of them, for as he had never parted with his interest in the premises the goods must be presumed to have been there lawfully (*s*).

A covenant of indemnity, however, will not entitle the lessee to recover from the assignee damages he has been compelled to pay to the lessor for breaches of covenant committed in respect of premises which have been used by the assignee, to his knowledge, for an immoral purpose (*t*). And the lessee's claim under such a covenant will be barred by an order of discharge obtained in bankruptcy by the assignee, even though the lessee have tendered no proof respecting it; for in the absence of an order of the Court to the contrary, the contingent liability upon the covenant is a debt

(*n*) *Harris v. Boots, &c., Ltd.*, [1904] 2 Ch. 376.

(*o*) *Bonner v. Tottenham, &c., Building Society*, [1899] 1 Q. B. 161.

(*p*) *Id.*, per A. L. Smith, L. J.

(*q*) *Id.*, per Vaughan Williams, L. J.

(*r*) The right of distress, as will be pointed out hereafter (*post*, p. 476), can be exercised, speaking generally, on all goods on the demised premises.

(*s*) *Groom v. Bluck*, 2 M. & Gr. 567.

(*t*) *Smith v. White*, L. R. 1 Eq. 626.

provable in the bankruptcy (*u*). But where an assignee under such a covenant re-assigned, taking a similar covenant from his assignee, and afterwards became bankrupt, it was held that the lessee, who had been called upon to pay the rent, and who had taken an assignment of the bankrupt's right to indemnity from his trustee, was entitled to enforce liability against the second assignee, and that such liability was not confined to the dividend payable to the lessee in respect of his proof against the estate of the first assignee, but extended to the whole amount of the obligation under the covenants to pay and indemnify entered into by him (*x*).

In conformity with the general principle, the assignee is liable to the lessee upon the covenant to repair only in respect of the dilapidations which have occurred during the continuance of his interest (*y*). And where an assignee undertook to perform all the covenants of the lease from the time of the assignment, he was held not to be liable to the lessee for previous dilapidations in respect of which the lessor had recovered against the lessee, even though it were shown that he had paid a lower price for the lease in consequence of their existence (*z*). But where the assignee, after being informed that the landlord had served a notice to repair upon his assignors, entered into an express covenant with them that he would "henceforth pay the rent by the said lease reserved, and observe and perform the lessee's covenants therein contained, and from the payment and performance thereof respectively . . . keep indemnified" the assignors, it was held that he had undertaken to indemnify them (*inter alia*) against any liability under the covenant to repair to which, whether at the time of the assignment or afterwards, they might be subject (*a*); for indemnifying a person from performance of a covenant means indemnifying him against any expenses which may be thrown upon him by reason of the obligation which he has undertaken (*b*). So when the assignee expressly covenants to indemnify the lessee, the latter can recover from him not only the whole sum for repairs he is called upon to pay to the lessor, but also all the costs (as between solicitor and client, and not merely as between party and party) which he may have incurred in unsuccessfully defending an action

(*u*) *Hardy v. Fothergill*, 13 App. Ca. 351.

(*x*) *In re Perkins*, [1898] 2 Ch. 182.

(*y*) *Smith v. Peat*, 9 Exch. 161.

(*z*) *Hawkins v. Sherman*, 3 C. & P. 459.

(*a*) *Gooch v. Clutterbuck*, [1895] 2 Q. B. 148.

(*b*) *Id.*, per Rigby, L. J.

by the lessor (*c*), provided they were properly incurred for the purpose of ascertaining the amount of the assignee's liability (*d*). Similarly where there are successive assignees, each of whom covenants to indemnify his immediate assignor, and the lessor upon the premises falling out of repair sues the lessee, who after settling his claim resorts to the first assignee,—the latter should either pay the lessee without waiting for an action to be brought against him (*e*), or if such action be brought let judgment go against him by default (*f*): as in either case he will be able to recover what he has paid (and in the latter even if he has not paid what he is liable for (*g*)) from the second assignee. Or he may now if he please bring him in as third party (*h*). It may be added that a covenant by the assignee to indemnify the lessee may be construed as absolute, although his covenant to pay the rent and perform the obligations of the lease may be subject to the qualification of being only applicable whilst a certain condition is fulfilled (*i*).

B. Assignment of Reversion.

At common law, covenants, though they ran, as has just been seen (*k*), with the land when they touch and concern the land, did not run with the reversion (*l*); although a contract contained in a lease—like a clause giving an option of purchase within the time sanctioned by the law as to perpetuities—might be enforceable in equity against successors to the reversion, as *binding the land* in the hands of the heirs or assigns of the lessor (*m*). This, however, was remedied by an early statute (32 Hen. 8, c. 34), which placed assignees of the reversion and of the term on the same footing, by providing that assignees of the reversion should have the same remedies by action and re-entry (*n*) against lessees and their assigns as the lessors had (*o*), and that lessees and their assigns

(*c*) *Howard v. Lovegrove*, L. R. 6 Ex. 43. He should give notice of the action to the assignee (*id.*), and may now avail himself in such case of the third party procedure under R. S. C. 1883, O. 16, rr. 48—55. See *ante*, p. 234.

(*d*) *Smith v. Howell*, 6 Exch. 730, per Pollock, C. B.; *Murrell v. Fysh*, C. & E. 80 (Watkin Williams, J.), where, however, only two-thirds of the whole costs were allowed.

(*e*) *Cousins v. Phillips*, 3 H. & C. 892.

(*f*) *Smith v. Howell*, *supra*, per Alderson, B.

(*g*) *Id.*, 6 Exch. 730. The covenant for this must be large enough, *e.g.* (as

in the case cited), to indemnify against all expenses, &c., that may be incurred.

(*h*) *Supra*, note (*c*).

(*i*) *Crossfield v. Morrison*, 7 C. B. 286.

(*k*) *Supra*, p. 418.

(*l*) *Notes to Thursby v. Plant*, 1 Wms. Saund. 277 (ed. 1871).

(*m*) *Woodall v. Clifton*, [1905] 2 Ch. at p. 278.

(*n*) Cf. *supra*, p. 417, at note (*i*).

(*o*) Sect. 1. Notice to the lessee of the assignment (except on the enforcement of remedies for rent: *post*, p. 463) is unnecessary: see *Scallock v. Harston*, 1 C. P. D. 106, cited *infra*, p. 438.

should have the same remedies by action against the assignees of the reversion as they had against the lessors (*p*). Covenants between landlord and tenant which run with the land (*q*), as a rule run also with the reversion (*r*); for it is settled that the statute does not apply to those which are merely collateral (*s*).

It should further be observed that the enactment in question deals only with the relation of landlord and tenant: consequently it has been held that a covenant by the lessor to give an option of purchase is not within its scope (*t*), because, although its effect may be to destroy the tenancy, its object is only to create the position of vendor and purchaser of the reversion between the owner and the tenant for the time being, and it is therefore not in reality a covenant concerning the tenancy or its terms (*u*). Where, again, a termor, for himself and his assigns, covenanted that if he should obtain—not from his own but from the superior landlord—an extension of his term (*x*) he would grant a corresponding extension to his tenant, it was held that the covenant ran only with the reversion which was vested in the lessor at the time when he entered into it, and that consequently the statute did not operate in a way to bind an assignee of the covenantor who after the assignment had obtained an extension of his interest in the premises (*y*). As in the case of the lessee (*z*), the liability of a lessor upon those of his express covenants which run with the reversion remains unaffected, notwithstanding the transfer, by the operation of the statute, of the privity of contract from him to the assignee of the reversion (*a*). But of course there must be a clear indication of an actual agreement by the lessor to bind himself (*b*).

As in the case of covenants running with the land (*c*), the statute only applies to demises under seal (*d*); so that in the case of parol

(*p*) Sect. 2.

(*q*) *Supra*, p. 417.

(*r*) *E.g.*, covenants to repair: *Matures v. Westwood*, Cro. Eliz. 599.

(*s*) *Spencer's case*, 5 Co. 16 a, *ad fin.*

(*t*) It will be noticed that the decision of the C. A. is entirely on the statute, and that the Court refrained from deciding whether the covenant in question was one which runs with the land.

(*u*) *Woodall v. Clifton*, [1905] 2 Ch. 257, where it is pointed out that in *In re Adams*, 27 Ch. Div. 394, the option had been exercised and accepted, and a merely subsidiary question was decided on the footing that what had already

been done need not be questioned by the Court.

(*x*) *Cf. supra*, p. 419, at note (*a*).

(*y*) *Muller v. Trafford*, [1901] 1 Ch. 54. But the reversion "vested in the lessor at the time" was the reversion which he assigned; and if so, why was it not bound by the covenant?

(*z*) *Ante*, pp. 162—164.

(*a*) *Stuart v. Joy*, [1904] 1 K. B. 362.

(*b*) *Bath v. Bowles*, 93 L. T. 801, cited *post*, p. 724.

(*c*) *Supra*, p. 421.

(*d*) *Standen v. Christmas*, 10 Q. B. 135; *Alcock v. Moorhouse*, 9 Q. B. Div. 366.

demises the assignee of the reversion should still sue in the name of the original lessor (*e*)—for the breach of any stipulation other than that to pay rent (*f*). For the right to sue on a personal contract is not assignable at law, and in the absence of a deed there is no estate in which that right can inhere (*g*). But, on the principle already explained (*h*), if upon an assignment of the reversion under a parol yearly demise rent has been paid by the tenant to the assignee and received without objection, an inference of fact may be drawn, from such payment and from notice to quit not having been given, that an agreement has been come to between them to go on upon the same terms as before (*i*). For this, however, it is necessary to show some act, such as payment of rent, definitely indicating a recognition of the new tenancy (*k*). And now, as it would seem, the benefit of a stipulation in a mere parol demise could enure as a chose in action to the assignee of the reversion (*l*) by virtue of the provisions of the Judicature Act (*m*).

Further, though the statute does not, as just stated, extend to collateral covenants, the doctrine of notice applies equally here as in the case of assignments of the term (*n*), so as to render on such application the distinction between those covenants and covenants running with the reversion immaterial in cases where they are of a negative or restrictive nature (*o*).

It is also to be observed that upon a purchase or assignment of the reversion the possession of a tenant is notice to the assignee (as between himself and the tenant (*p*)) of the actual interest, including any equities, the tenant may have in the premises (*q*), and even, as it has been held, of rights which have accrued to the latter under a contract posterior to, and independent of, the contract under which he holds possession (*r*). Thus, for instance, a lessee can enforce an option of renewal against an assignee of the reversion

(*e*) *Bickford v. Parson*, 5 C. B. 920.

(*f*) *Harmer v. Bean*, 3 C. & K. 307; *ante*, p. 164.

(*g*) *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608, per Farwell, J.

(*h*) *Supra*, p. 421.

(*i*) *Cornish v. Stubbs*, L. R. 5 C. P. 334 (see per Willes, J.); *Wyatt v. Cole*, 36 L. T. 613; *Manchester Brewery Co. v. Coombs*, *supra*.

(*k*) *Smith v. Eggington*, L. R. 9 C. P. 145.

(*l*) See *Manchester Brewery Co. v. Coombs*, *supra*, per Farwell, J.; *Torkington v. Magee*, [1902] 2 K. B. 427 (revd.,

C. A., on another point, [1903] 1 K. B. 644).

(*m*) 36 & 37 Vict. c. 66, s. 25, sub-a. (6); see *supra*, p. 422. The case of rent has been already dealt with: see *ante*, p. 164.

(*n*) *Supra*, pp. 424—427.

(*o*) *Olegg v. Hands*, 44 Ch. Div. 503.

(*p*) See per James, L. J., *Caballero v. Henty*, L. R. 9 Ch. 447; 1 Dart, V. & P. 884 (7th ed.).

(*q*) *Taylor v. Stibbert*, 2 Ves. 437; *Daniels v. Davison*, 16 Ves. 249; *Greenwood v. Bairstow*, 5 L. J. Ch. 179.

(*r*) *Allen v. Anthony*, 1 Mer. 282.

who purchases without actual notice of its existence (*s*). On the other hand, where a lessor, by letter to his lessee, agreed "not to increase your rent and not to give notice to quit so long as you desire to continue my tenant" (*t*), it was held that the undertaking not to disturb the possession was not enforceable by the tenant against a purchaser of the reversion with either actual or constructive notice of it (*u*). But while a tenant's occupation is notice of all that tenant's rights, it is not notice of his lessor's title or rights; though actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor is notice of that person's rights (*x*).

The result of the whole seems, therefore, to be that the assignee of the reversion will be bound: (*a*) by covenants which touch or concern the land and so run with the reversion (*y*); and probably also (*β*) by any other covenants of a negative or restrictive kind contained in the lease, inasmuch as he has, as just pointed out, at least constructive notice of them.

On the other hand, the assignee of the reversion may, as against the lessee, take advantage (*a*) of all covenants running with the reversion; and (*β*) of any other covenants of a restrictive character relating to the property which have been entered into by the lessee for the benefit of the lessor, and in consideration of which he may be presumed to have obtained the premises at a diminished rent (*z*).

Where a reversion becomes divided by assignment to persons as tenants in common, each of them can, independently of the other or others, maintain an action on a covenant running with the land or reversion (*a*).

The effect of an assignment of the reversion, whether by way of mortgage or otherwise, upon the covenant or agreement to pay rent has already been considered (*b*); and it has been pointed out that while the assignor, on the one hand, has no claim to rent which has

(*s*) *Lewis v. Stephenson*, 67 L. J. Q. B. 296.

(*t*) As to this class of tenancy, see *ante*, pp. 16, 112.

(*u*) *Roberts v. Tregaskis*, 38 L. T. 176. The question was one of construction, and great (and perhaps undue) stress was laid by the Court on the penultimate word of the clause, as showing that this was a mere personal undertaking between the parties.

(*z*) *Hunt v. Luck*, [1902] 1 Ch. 428, where it is pointed out that the law as

to notice now depends on the Conv. Act, 1882 (45 & 46 Vict. c. 39, s. 3: *supra*, p. 426), and that the prior law can only be used "as a shield," and is not to be treated as going beyond the law as laid down in that section: per Vaughan Williams, L. J.

(*y*) *Supra*, pp. 417—422.

(*z*) *Clegg v. Hands*, 44 Ch. Div. 508.

(*a*) *Roberts v. Holland*, [1893] 1 Q. B. 665.

(*b*) *Ante*, p. 164.

accrued after the assignment (*c*), the assignee, on the other, has no claim to rent which has accrued before it (*d*). So, with regard to other covenants, the assignor cannot sue for breaches committed after the assignment; though where the assignment is only by way of mortgage, and the mortgagor continues to receive the rents and profits without interference by the mortgagee, it would seem that, whether or not he may claim damages for a breach of covenant (*e*), he has sufficient interest for the application of the equitable remedy of injunction (*f*). The assignee, on the other hand, has in general no cause of action in respect of breaches committed before he has acquired the reversion (*g*). Thus, where lessees who had covenanted to leave the demised premises in a specified condition of repair at the end of the term held over as yearly tenants, and during such holding over the reversion was assigned, it was held that the assignee could not recover in respect of the dilapidations which had accrued during the term (*h*). It may, however, be pointed out that it by no means follows from this that if the reversion changes hands *during the currency of a term* the tenant, on being sued for dilapidations by the assignee, is entitled to split the demand against him and set up as regards a portion of it that the dilapidations accrued before the reversion became vested in the plaintiff (*i*). But a tenant has been held entitled to go into evidence as to the state of repair of the premises at that time (*k*). Where a lease contained covenants to repair and to repair after notice (*l*), it was held that notice given by an assignee of the reversion, and not complied with, gave him a right of action, even though the premises were in a ruinous condition before their assignment to him (*m*). When an assignee of the reversion sues upon the covenants of the lease, it seems that he is bound to set out in his pleading, first, the nature of the reversion, and that he is an assign (*n*) of the reversion; and, secondly, in

(*c*) *Harmer v. Bean*, 3 C. & K. 307.

(*d*) *F'light v. Bentley*, 7 Sim. 149; *Sharp v. Key*, 8 M. & W. 379.

(*e*) This would appear to depend on the true meaning of the word "wrong" in s. 25 (5) of the Jud. Act, 1873: per Bramwell, L. J., in next cited case. In leases made after the year 1881, it seems possible that the mortgagor would now be able to sue, as a person entitled, subject to the term, to the income of the land leased, under s. 10 of the Conv. Act (44 & 45 Vict. c. 41): *infra*, p. 439. See *ante*, p. 322.

(*f*) See *Fairclough v. Marshall*, 4 Ex. Div. 37.

(*g*) See *Martyn v. Williams*, 1 H. & N. 817.

(*h*) *Johnson v. St. Peter, Hereford*, 4 A. & E. 520.

(*i*) As to continuing nature of breaches of the covenant to repair, see *post*, p. 653.

(*k*) *Brown v. Trumper*, 26 Beav. 11.

(*l*) See *ante*, p. 217.

(*m*) *Mascal's case*, 1 Leon. 62.

(*n*) See *Norris v. Craig*, 64 L. J. Q. B. 432.

what manner he became that assign, *i.e.*, the various deeds and documents by which that assignment was made to him (*o*).

Even where a lease operates only by way of estoppel, as will be explained hereafter (*p*), the reversion is capable of assignment, so as to entitle the assignee to the benefit of the covenants (*q*). The assignee of the reversion in copyholds is an assignee within the meaning of the statute (*r*). And so is the remainderman in the case of a lease made by a tenant for life under a power (*s*); for though not an assignee of the person actually making the lease, the person who empowers the lease to be granted is for this purpose in the eye of the law the lessor (*t*).

Severance of reversion.—Where the lessor assigns less than his whole interest in the demised premises, he is said to “sever” the reversion. This may happen in one of two ways. He may assign the whole of the premises comprised in the lease, but for a less interest than he is himself possessed of, *e.g.*, being tenant in fee, he may convey it for years only. In this case, the assignee is said to be assignee of “part of the reversion.” Or he may assign part of the premises included in the demise, but for the whole interest of which he is himself possessed. In this case the assignee is said to be assignee of the “reversion of part.”

Covenants, where they are apportionable, run with the reversion both in the former case (*u*) and in the latter (*x*). (The special case of rent has already been dealt with (*y*).) Similarly, the assignee of a reversion in which a part of the term has merged is also within the statute (*z*); so that the partial merger of a lease, by part of the reversion coming to the lessee, does not deprive the co-lessors of the benefit of the covenant, the damages recoverable being commensurate with their interest (*a*).

Conditions stand upon a somewhat different footing. As already stated (*b*), assignees of the reversion are entitled under the

(*o*) *Davis v. James*, 26 Ch. D. 778; approved of by Rigby, L. J., in *Darbyshire v. Leigh*, [1896] 1 Q. B. 554. But the effect of the payment of rent in raising a presumption of the plaintiff's title (see *post*, p. 471) does not appear to have been considered in the judgment.

(*p*) *Post*, pp. 473, 474.

(*q*) *Cuthbertson v. Irving*, 6 H. & N. 135.

(*r*) *Glover v. Cope*, 3 Lev. 326; *Whitton v. Peacock*, 3 My. & K. 325.

(*s*) *Isherwood v. Oldknow*, 3 M. & S. 382.

(*t*) *Id.*, per Le Blanc, J. See now, Conv. Act, 1881, s. 10, *infra*, p. 439.

(*u*) *Atloe v. Hemmings*, 2 Bulst. 281.

(*x*) *Twynnam v. Pickard*, 2 B. & A. 105.

(*y*) *Ante*, pp. 125–8.

(*z*) *Badeley v. Vigurs*, 4 E. & B. 71.

(*a*) *Id.*, per Wightman, J., citing *Yates v. Cole*, 2 D. & B. 660 (reported as *Gates v. Cole*, 5 Moore, 554).

(*b*) *Ante*, p. 321.

statute (c) to the benefit of conditions of re-entry in the lease; and this (except in the case of re-entry for non-payment of rent (d)) even without giving notice of the assignment to the tenant (e). So the right of re-entry reserved to a lessor, his heirs and assigns, in a lease granted in pursuance of a power contained in a settlement, extends to subsequent owners of the reversion under the settlement, though neither heirs nor assigns of the lessor, inasmuch as the word "assigns" may be construed to intend assigns of the settlor; nor does it make any difference in such a case that the lessor has himself only an equitable interest (f). But as with covenants (g), assignees can only take advantage, for the purpose of re-entry, under a proviso, of breaches occurring in their own time (h), i.e., after the reversion has become vested in them by the assignment (i).

In respect of severance, however, a distinction prevailed at common law in the two classes of cases just mentioned; for while the assignee of part of the reversion might always take advantage of conditions broken (k), the assignee of the reversion of part could not do so (l), since it was held that conditions could not be apportioned by the act of the party (m). But it is now enacted (n) that "where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him." The only condition, as will have been seen, dealt with by the above enactment is that of re-entry for non-payment of rent, and it is only applicable where the rent is legally apportioned (o).

With regard to leases made after the year 1881, however, a further change in relation to this matter was introduced by the

(c) *Supra*, p. 432.

(d) 4 Anne, c. 16, s. 10; *post*, p. 463.

(e) *Scallock v. Harston*, 1 C. P. D. 106.

(f) *Greenaway v. Hart*, 14 C. B. 340. Cf. *infra*, pp. 439, 440.

(g) *Supra*, p. 436.

(h) See Co. Lit. 215 a. Lord Coke, however, seems to confine the proposition to conditions *in law*.

(i) *Fenn v. Smart*, 12 East, 444; *Crane v. Batten*, 23 L. T. (O. S.) 220; *Bennett v. Herring*, 3 C. B. N. S. 370; *Cohen v. Tannar*, [1900] 2 Q. B. 609.

(k) *Wright v. Burroughes*, 3 C. B. 685.

(l) See *Twynam v. Pickard*, *supra*.

(m) Co. Lit. 215 a.

(n) 22 & 23 Vict. c. 35, s. 3.

(o) 1 Sm. L. C. 67 (11th ed.); *ante*, p. 126.

Conveyancing Act (*p*), the effect of which is to apportion all conditions in their nature apportionable, which previously would have run with the unsevered reversion (*q*). For that Act provides as follows (*r*) :—

“Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease (*s*) as to part only of the land comprised therein, every condition or right of re-entry, and every other condition contained in the lease, shall be apportioned and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.”

The Conveyancing Act has also—with regard to leases made after the year 1881—effected further alterations in the whole of this branch of the subject. It is provided by that Act (*t*) that “rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee’s part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.”

It is also provided (*u*) that “the obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary

(*p*) 44 & 45 Vict. c. 41.

(*q*) 1 Sm. L. C., *ubi sup.*

(*r*) Sect. 12.

(*s*) The word is not defined in the Act. But it is thought that in the three sections now considered it should receive the same interpretation as in the

Act 32 Hen. 8, c. 34 (*supra*, p. 432), of which they are the extension, and consequently be confined to demises under seal. See per Farwell, J., in *Manchester Brewery Co. v. Combs*, [1901] 2 Ch. 608.

(*t*) Sect. 10.

(*u*) Sect. 11.

estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled." But this enactment (it has been so laid down (x)) in no way alters the law as to the class of covenants the burden of which will run with the reversion; nor will it enlarge the *scope* of a covenant as against assignees of the reversion, by causing an act which otherwise would not be within it to be a breach (y).

In consequence of the above provisions, the rule no longer prevails that to make a covenant run with the reversion it must have been entered into with the owner of the legal reversion: a rule which entailed the result that where a mortgagor and mortgagee joined in making a lease in which the lessee's covenants were only with the mortgagor and his assigns, though the mortgagor himself was entitled to sue upon them as being covenants in gross (z), the assigns of the mortgagee could not do so (a). Now, under sect. 10, whenever there is a legal reversion, *i.e.*, where there is a lease made by means of an ordinary power or a statutory power (as under sect. 18 of the Act (b)) enabling a legal term to be carved out of the reversion, the lessee's covenants, whether so expressed or not, are annexed to and run with the reversion, and are no longer covenants in gross (c). Hence a mortgagee, on giving notice to the tenant of the mortgage, may avail himself of the benefit of the covenants and conditions contained in a lease made by the mortgagor under the provisions of the Act (d). So under sect. 11 the covenants of a lessor who has power to bind the reversionary estate will run with it and bind the reversioner, though the lessor be tenant for life only or, as mortgagor, be entitled only to an equitable interest (e). Attention has already (f) been called to

(x) Per Cozens-Hardy, L. J., in next-cited case.

(y) *Davis v. Town Properties Corporation*, [1903] 1 Ch. 797, cited *ante*, p. 302. (In the Court below the case is reported as *Davies v. Town Properties Corporation*, [1902] 2 Ch. 635.)

(z) *Russell v. Stokes*, 1 H. Bl. 562; affirming *Stokes v. Russell*, 3 T. R. 678.

(a) *Webb v. Russell*, 3 T. R. 393.

(b) *Ante*, p. 61.

(c) Wolstenholme on the Conv. Acts, p. 54 (9th ed.).

(d) *Municipal, &c., Building Society v. Smith*, 22 Q. B. Div. 70.

(e) Wolstenholme, *ubi sup.*

(f) *Ante*, p. 117.

the fact that the former section entitles the *beneficial* owner to the benefit of the provisions in the lease whether the owner of the legal reversion or not.

II.—ASSIGNMENT BY OPERATION OF LAW.

The foregoing principles relate to assignment by the voluntary act of the parties. It remains to consider cases where the interest to which a party is entitled as owner of a term or a reversion is transferred, independently of his will and by devolution of law, to another person. There are three such cases to be dealt with, viz. where the transfer takes place as the result of (A) death; (B) a writ of execution; and (C) bankruptcy. Formerly, the marriage of a woman possessed of a chattel real (not settled to her separate use) operated as a species of assignment of such interest to her husband, for it conveyed to him the absolute possession of the chattel real during the marriage "by a kind of joint tenancy with his wife" (g); while the marriage of a female lessor entitled to freeholds conveyed to him during the marriage a freehold interest in them (h). In both cases the husband was entitled to alienate (i); and he might even make a valid assignment of his wife's reversionary interest in leaseholds, unless that interest was of such a nature that it could not by any possibility vest in her in possession during the marriage (k). But, as already stated (l), these doctrines have become obsolete as the result of modern legislation (m).

(A.) *Death.*

Vesting of terms of years.—Upon the death of a person all his leasehold interests (including tenancies from year to year (n)) vest in his personal representatives (o): from the time of death in the case of executors, and from the grant of letters of administration in the case of administrators (p). (As regards the *freeholds*, too, of a testator dying after the year 1897 the same rule now holds good (q), though, as has already been stated (r), in the case of an

(g) 2 Black. Comm. 434. See *ante*, pp. 42, 43.

(h) *Robertson v. Norris*, 11 Q. B. 916.

(i) See last-cited case, and p. 42, *ante*.

(k) *Day v. Duberley*, 5 H. L. C. 388; affirming *Duberley v. Day*, 16 Beav. 33.

(l) *Ante*, p. 43.

(m) See 45 & 46 Vict. c. 75.

(n) *Doe v. Porter*, 3 T. R. 13; *James v. Dean*, 11 Ves. at p. 393, per Lord Eldon, L. C.; *Doe v. Wood*, 14 M. & W. 682.

(o) 1 Wms. Exors. 512 (10th ed.); *Ackland v. Pring*, 2 M. & Gr. 937.

(p) 1 Wms. Exors. 467, 468.

(q) 60 & 61 Vict. c. 65, s. 1.

(r) *Ante*, p. 57.

intestacy it would seem that they vest until administration granted in the heir-at-law.) This applies notwithstanding that those interests may have been made the subject of a specific bequest; for such bequest cannot take effect till it has received their assent (*s*), even where the bequest is to the executor himself (*t*), in which case indeed stronger evidence of such assent by him is necessary (*u*), such as entering into possession and dealing with the property as his own (*x*). The question whether assent has been given or not is one of fact (*y*), and when once it has been given it cannot be recalled (*z*). To make an assent once given on the part of an executor operative, all that is required is that the will should be proved at some time and by some person (*a*). But an administrator can assent (as he can do anything else in that capacity) only after the grant of letters of administration, for he derives his authority entirely from them (*b*). Thus he cannot, for instance, before such grant surrender a tenancy from year to year (*c*); nor is he bound after such grant by an agreement he may have entered into (in the capacity of executor *de son tort*) before it, to surrender demised premises in consideration of a claim for rent being abandoned (*d*). Once the executor has assented, the legatee or devisee, under a bequest (accepted by him), whether specific or by way of residue, becomes clothed with the rights and liabilities of an assignee (*e*).

Rights of executors.—The personal representative of a deceased lessor (*f*) or lessee is entitled to bring actions in respect of any breaches of covenant committed in the time of the testator or intestate, *e.g.*, to recover arrears of rent (*g*). Nor is this right confined to cases where such breach has directly caused damage to the personal estate; for wherever the benefit of the covenant, if it had remained unbroken, would have passed to the executors as part

(*s*) 2 Wms. Exors. 1101; *Doe v. Maberley*, 6 C. & P. 126; *Thorne v. Thorne*, [1893] 3 Ch. 196. As to assent in the case of a devise of a lessor's *freeholds*, where the testator's death takes place after the year 1897, see now 60 & 61 Vict. c. 65, s. 3.

(*t*) *Paramour v. Yardley*, Plowd. 539; *Young v. Holmes*, 1 Str. 70; *Doe v. Sturges*, 7 Taunt. 217.

(*u*) *Hawkins v. Williams*, 10 W. R. 692.

(*x*) *Fenton v. Clegg*, 9 Exch. 680.

(*y*) *Mason v. Farnell*, 12 M. & W. 674.

(*z*) *Doe v. Guy*, 3 East, 120.

(*a*) *Johnson v. Warwick*, 17 C. B. 516.

(*b*) 1 Wms. Exors. 314; *ante*, p. 57.

(*c*) *R. v. Great Glenn*, 5 B. & Ad. 188.

(*d*) *Doe v. Glenn*, 1 A. & E. 49.

(*e*) *In re Culverhouse*, [1896] 2 Ch. 251; *Hawkins v. Hawkins*, 13 Ch. Div. 470; *Austin v. Bedloe*, 41 W. R. 619.

(*f*) In the case of *freeholds*, where the lessor's death occurs after the year 1897, the provisions of sect. 1 of the Land Transfer Act (60 & 61 Vict. c. 65) will apply. See *supra*.

(*g*) 1 Wms. Exors. 631; *Dollen v. Batt*, 4 C. B. N. S. 760.

of the personalty, an action for its breach (at all events where the covenant is under seal) may be brought by them whether the covenant be one that runs with the land or not (*h*). Thus, for instance, an action may be brought by the executor of the landlord for a breach committed during the latter's life of the tenant's covenant to repair (*i*). And similarly the executor of the tenant may recover against the landlord or his representatives for a breach of the covenant for quiet enjoyment (*k*).

Liabilities of executors.—1. *At common law* (*l*).—The personal representative is *primâ facie* liable upon all covenants of the testator or intestate which have been broken during his life (*m*), as well as for all breaches in his own time (*n*); but it is no part of the contract between lessor and lessee that on the latter's death his assets shall be impounded to answer the future rent and covenants (*o*).

An executor *de son tort* stands in the above respect on the same footing (*p*); and though the mere fact that a person who has received a lease from an executor *de son tort* and during the latter's lifetime occupied and paid rent to the lessor does not render him also an executor *de son tort*, so as to make him liable as an assignee (*q*), that liability will arise if after the death of the executor *de son tort* he continue in beneficial occupation of the property on his own account (*r*).

In the case of a demise to joint tenants,—upon the death of one of them his executors are not liable upon its covenants, inasmuch as the term vests by survivorship in the others (*s*); but by special stipulation in the demise to that effect they may become liable though the entire benefit of the lease pass to the survivors (*t*).

Like any other assignee (*u*), an executor may get rid of his liability by re-assignment (*x*); and one of several executors may thus dispose of their testator's interest without the concurrence of

(*h*) *Raymond v. Fitch*, 2 C. M. & R. 588.

(*i*) *Ricketts v. Weaver*, 12 M. & W. 718.

(*k*) *Lucy v. Levington*, 1 Vent. 175. For an instance of an action on this covenant brought against the heir as assignee of the reversion, see *Derisley v. Custance*, 4 T. R. 75.

(*l*) See notes to *Dean of Bristol v. Guyse*, 1 Wms. Saund. 124 (ed. 1871).

(*m*) See *infra*, pp. 444, 445.

(*n*) *Tilney v. Norris*, 1 Ld. Ray. 553.

(*o*) *King v. Malcott*, 9 Hare, 692. See *In re Nixon*, [1904] 1 Ch. 638.

(*p*) 1 Wms. Exors. 190.

(*q*) *Paull v. Simpson*, 9 Q. B. 365.

(*r*) *Williams v. Heales*, L. R. 9 C. P. 177.

(*s*) 2 Black. Comm. 183, 184; *ante*, p. 69.

(*t*) *Burns v. Bryan*, 12 App. Ca. 184.

(*u*) *Supra*, p. 427.

(*x*) See *Pitchev v. Tovey*, 4 Mod. 71; *Rowley v. Adams*, 4 My. & Cr. 534.

the others (*y*). If, however, the testator was original lessee under the lease, the executor cannot get rid of such liability in this manner as his representative holding assets (*z*); and liability (as regards express covenants) can also be enforced against him where the testator himself has assigned over during his life, even though the assignee may have been accepted as tenant by the lessor (*a*).

The actual liability of executors is different in the case of rent and in that of other covenants (*b*), such as the covenant to repair.

(*a*) For rent (*c*).—For the recovery of arrears due in the lifetime of the testator the action must be brought against the executor in his representative capacity, and the judgment is only against the goods of the testator (*d*). For such rent the landlord has no priority over the other creditors whether by specialty or simple contract (*e*). For arrears falling due subsequently he can be charged either in that capacity (the judgment then being also *de bonis testatoris* (*f*)), or personally as assignee of the term (the judgment then being *de bonis propriis* (*g*)). In the latter case entry, or some act equivalent to it, on the part of the executor is necessary (*h*), and the fact that he has paid rent falling due after the testator's death is not of itself sufficient for this purpose (*i*); in the former it is immaterial (*k*). Where the testator himself has assigned over in his lifetime, the executor cannot be charged as assignee; and the same thing applies where the executor has assigned over (except in respect of the period during which he was in occupation (*l*)), even where he has paid in the purchase-money derived from the assignment to the testator's estate as part of the assets (*m*). If the executor be sued as such for rent due after the death of the testator, he may plead that he has fully administered all the assets (*n*); but this will not exonerate him from liability for the profits received from the land, since these should have been primarily applied in discharge of the rent (*o*).

(*y*) *Hawkins v. Williams*, 10 W. R. 692.

(*z*) *Coghil v. Freelove*, 3 Mod. 325; *Hellier v. Casbard*, 1 Sid. 266.

(*a*) *Brett v. Cumberland*, Cro. Jac. 521; *Bachelour v. Gage*, Cro. Car. 188. Cf. *ante*, p. 162.

(*b*) For an illustration of an attempt to enforce it in respect of the covenant to insure, see *Fry v. Fry*, 27 Beav. 146.

(*c*) See also p. 407, *ante*.

(*d*) 2 Wms. Exors. 1388.

(*e*) 32 & 33 Vict. c. 46; *Shirreff v. Hastings*, 6 Ch. D. 610.

(*f*) *Buckley v. Pirk*, 1 Salk. 316.

(*g*) 2 Wms. Exors. 1391; *Hargrave's case*, 5 Co. 31 a.

(*h*) *Wollaston v. Hakevill*, 3 M. & Gr. 297; *Kearley v. Oxley*, 2 H. & C. 896.

(*i*) *Rendall v. Andrae*, 61 L. J. Q. B. 630.

(*k*) See 2 Wms. Exors. 1388-1391 (10th ed.).

(*l*) *Id.*, 1394.

(*m*) *Goodland v. Ewing*, C. & E. 43, Stephen, J.

(*n*) *Lyddall v. Dunlapp*, 1 Wils. 4; *Wilson v. Wigg*, 10 East, 313.

(*o*) 2 Wms. Exors. 1393, n. See *Collins v. Crouch*, 13 Q. B. 542.

On the other hand, if sued as assignee he cannot avail himself of such a plea (*p*); and if the rent reserved does not exceed the profits of the land, so much of the profits as suffices to make up the rent is to be appropriated to the lessor and cannot be applied to anything else (*q*), while if the rent exceed the profits the executor may plead to that effect and that he has no assets (*r*). This plea, however, will not free him from personal liability for so much of the rent as the premises are worth during the time he has held them as assignee (*s*), such value being arrived at by considering what he has actually received and adding thereto what he might have further obtained if he had used reasonable diligence, always provided the aggregate does not exceed the full amount of the rent (*t*). This has been expressed by saying that by proper pleading he may limit his liability for rent to the yearly value which the premises might have yielded (*u*). Nor for this purpose can he avail himself of a reduction of value occasioned solely by the want of repair in his own time (*x*) (for, as will be seen presently, such want of repair is in itself a breach of duty on his part (*y*)), nor of the fact that the premises were underlet by the testator to a person who from insolvency has been unable to pay his rent (*z*).

It has frequently been said that an executor cannot waive a term, but must renounce the executorship *in toto* or not at all (*a*). It seems, however, that if the rent be in excess of the value of the premises and there be a deficiency of assets he may do so (*b*). If there are assets, but not enough, he must pay the rent so long as they hold out and then waive the possession, giving notice to the reversioner (*c*).

(b) For repairs.—Although, as has just been seen, the personal liability of the executor in respect of rent does not exceed the value of the demised premises, this qualification does not extend to the covenant to repair (*d*); and though it has been suggested that

(p) 2 Wms. Exors. 1390.

(q) *Buckley v. Pirk*, 1 Salk. 316.

(r) *Billinghurst v. Speermin*, 1 Salk. 297; *Reid v. Lord Tenterden*, 4 Tyr. 111.

(s) *Rubery v. Stevens*, 4 B. & Ad. 241.

(t) *In re Bowes*, 37 Ch. D. 128; *Hopwood v. Whaley*, 6 C. B. 744.

(u) *Rendall v. Andreas*, 61 L. J. Q. B. 630, per A. L. Smith, J.

(x) *Hornidge v. Wilson*, 11 A. & E. 645.

(y) See under next head.

(z) *Hornidge v. Wilson*, *supra*.

(a) *Hellier v. Casbard*, 1 Sid. 266;

Howse v. Webster, Yelv. 103; *Billinghurst v. Speerman*, 1 Salk. 297; *Rubery v. Stevens*, 4 B. & Ad. 241.

(b) *Wilkinson v. Cawood*, 3 Anst. 905, per Macdonald, C. B.; *Stephens v. Hotham*, 1 K. & J. at p. 575, per Wood, V.-C.; *Reid v. Lord Tenterden*, 4 Tyr. 111, per Bayley, B.

(c) 2 Wms. Exors. 1393.

(d) *Tremere v. Morison*, 1 Bing. N. C. 89; *Tilney v. Norris*, 1 Ld. Ray. 553; *Rendall v. Andreas*, 61 L. J. Q. B. 630, per A. L. Smith, J.

an offer on his part to surrender the premises to the landlord may have the effect of removing or diminishing this liability (*e*), it is now settled that such an offer has no such operation (*f*). In the case, therefore, of the covenant to repair—and apparently in that of other covenants running with the land (except that relating to rent (*g*))—the fact that the premises are capable of yielding no profit affords no defence to the executor. But, as in the case of rent, the executor cannot be made liable as assignee of the term without entry (*h*).

2. *By statute*.—The law as above set out having been thought to operate somewhat hardly on executors and administrators—and, even in equity, once executors assented unconditionally to a specific bequest of leaseholds they could not afterwards require an indemnity from the general estate of their testator in respect of the covenants contained in his leases (*i*),—the legislature intervened with an enactment for their relief.

By stat. 22 & 23 Vict. c. 35, it is provided (*k*) as follows:—
“Where an executor or administrator, liable as such to the rents, covenants, or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having where necessary set apart such sufficient fund as aforesaid, be

(*e*) *Reid v. Lord Tenterden*, 4 Tyr. 111, per Bayley, B.

(*f*) *Sleap v. Newman*, 12 C. B. N. S. 116.

(*g*) *Supra*, p. 445.

(*h*) *Rendall v. Androae*, *supra*. See, too, note in 2 Wms. Exors. 1389-90.

(*i*) *Shadbolt v. Woodfall*, 2 Coll. 30.

(*k*) Sect. 27.

personally liable in respect of any subsequent claim under the said lease or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed."

The effect of the above provision is, that if an executor has sold his testator's leaseholds and assigned them to a purchaser (*l*), he may, of his own authority and without the order of the Court, distribute the assets without making provision for future breach of covenant in the leases, and shall not be subject to any liability (*m*); but if he assigns them to the devisees or to trustees for them, he loses its protection, for they are not purchasers (*n*). Executors bringing all the facts before the Court and distributing the assets under its direction are also protected against any future claims, and the only remedy of the lessor is against the legatees (*o*).

(B.) *Execution.*

When a person entitled to a chattel real suffers a judgment, there are two ways in which it can be taken in execution, *i.e.*, there are two ways in which a transfer or assignment of it takes place through the intervention of the sheriff—by *fi. facias* and by *elegit*. By the former the lease is seized and the term sold, so that it vests in a purchaser; by the latter a particular estate in the lands, which is known as a tenancy by *elegit* (*p*), and which endures until the judgment is satisfied (*q*), is vested in the execution creditor himself.

(a) *Fieri facias*.—When a term is sold under a *fi. fa.*, seizure of the lease—and a constructive seizure for this purpose is sufficient (*r*)—does not vest the term in the sheriff, but it remains in the debtor, even after the sale, until actually assigned (by deed, as in other cases (*s*)) by the sheriff to the purchaser (*t*); nor has the sheriff

(l) Otherwise the Act does not apply: *In re Nizon*, [1904] 1 Ch. 638, per Byrne, J.

(m) *Dodson v. Sammell*, 1 Dr. & Sm. at p. 579, per Kindersley, V.-C.

(n) *Smith v. Smith*, 1 Dr. & Sm. 384.

(o) *Bennett v. Lytton*, 2 J. & H. 155. Other cases on the Act will be found in 2 Seton on Judgments and Orders, 1527 (6th ed.).

(p) See p. 64, *ante*. This writ, unlike a *fi. fa.*, applies to freeholds as well as leaseholds.

(q) *Price v. Varney*, 3 B. & C. 733.

(r) *Coleman v. Rawlinson*, 1 F. & F. 330.

(s) *Supra*, p. 412.

(t) *Playfair v. Musgrove*, 14 M. & W. 239.

power, except with the debtor's consent (*u*), to place in possession the purchaser (*x*), who is as a rule left to the remedy of bringing ejectment (*y*). Hence, if the purchaser were merely put into possession by the sheriff without a proper assignment, he had no answer at law to an action of ejectment brought against him by the debtor (*z*). But where the sale has taken place before the writ is returnable, the mere fact that the assignment is not executed till afterwards will not make it invalid (*a*). The assignment may be executed by the under-sheriff in the name and under the seal of the sheriff (*b*).

The interest of a yearly tenant can be taken in execution in the same way as a term of years (*c*). But though execution by *fi. fa.* applies to a term of years in which the debtor has only a legal interest (as where he has already entered into an agreement for its assignment (*d*)), a term of years in which the debtor has only an equitable interest cannot be taken under this writ (*e*). In order to reach such an interest recourse must be had to what is usually termed "equitable" execution, by applying to the Court for the appointment of a receiver (*f*); and the Judicature Act has made no difference in the above respect (*g*). The purchaser of a term under a *fi. fa.* is in the same position as any other assignee, and the execution debtor, if the original lessee of the term, remains liable to his lessor, agreeably to the usual rule (*h*), upon all express covenants in the lease (*i*).

(b) **Elegit.**—When, on the other hand, an execution creditor is put into possession of chattels real of his debtor under an *elegit* (*k*)—and the exclusion by the Bankruptcy Act (*l*) of "goods" from the operation of this writ does not extend to chattels real (*m*),—the

(*u*) *Taylor v. Cole*, 3 T. R. 292.

(*x*) *R. v. Deane*, 2 Show. 85; *Playfair v. Musgrove*, *supra*, per Rolfe, B.

(*y*) *Doe v. Murless*, 6 M. & S. 110. In such action the possession of the defendant is *prima facie* evidence of the term being vested in him: *id.*

(*z*) *Doe v. Jones*, 9 M. & W. 372.

(*a*) *Doe v. Donston*, 1 B. & A. 230.

(*b*) *Doe v. Braun*, 5 B. & A. 243.

(*c*) *Doe v. Smith*, 1 M. & Ry. 137.

(*d*) *Sparrow v. Bristol (Lord)*, 1 Marsh. 10.

(*e*) *Scott v. Scholey*, 8 East, 467; *Lyster v. Dolland*, 1 Ves. 431; *In re Duke of Newcastle*, L. B. 8 Eq. 700; *Backhouse v. Siddle*, 38 L. T. 487.

(*f*) See 2 Chit. Arch. pp. 914 *et seq.*

(14th ed.); note in *Ann. Prac.* to O. 50, r. 16 of R. S. O. 1883; *In re Shephard*, 43 Ch. Div. 131.

(*g*) See p. 450, *infra*, and cases there cited.

(*h*) *Ante*, pp. 162, 219.

(*i*) *Auriol v. Mills*, 4 T. B. 94, per Lord Kenyon, C. J.

(*k*) Under 1 & 2 Vict. c. 110, s. 11. The writ applies not merely to the lands of which the debtor is possessed at the time of entering up judgment, but to those he becomes possessed of afterwards, as well as to those over which either at such time or afterwards he has an absolute power of disposal: *id.*

(*l*) 46 & 47 Vict. c. 52, s. 146.

(*m*) *Richardson v. Webb*, 1 Morr. 40.

sheriff does not give him actual possession of the land itself, but the effect of the return is that it vests the legal estate in him (*n*). Hence he can bring ejectment if the estate be in possession, and recover rent if it be a reversion (*n*), either by action (*o*) or by distress (*p*) against the occupiers (without any attornment by them being necessary) (*q*), provided such rent has accrued after the inquisition and not merely after the delivery of the writ to the sheriff (*r*), and provided the term is one which is properly extendible under the writ (*s*).

Like other assignees of the reversion, however, he cannot bring ejectment against the occupiers or undertenants without first giving them a proper notice to quit or otherwise legally determining their interests (*t*). Nor can he recover in ejectment against the execution debtor where the legal estate in the lands is vested in other persons, unless so vested for his benefit exclusively (*u*); and similarly he cannot sue an occupier for rent unless the immediate legal reversion of the latter's interest is vested in the debtor or in a trustee for his sole benefit (*x*). A tenant by elegit, moreover, holds the lands subject to an account in the court out of which the writ has issued (*y*); and he always takes subject to any equities to which the land was subject in the hands of the debtor (*z*). He takes the whole term vested in the debtor, but subject to a legal title in the latter, in the nature of an executory interest, which cannot be defeated by any act of the former (*a*). Hence, when a person possessed of leaseholds had mortgaged them by way of subdemise, but the mortgagees had not taken possession at the date of the inquisition, it was held that the lands must be taken to have been delivered to the judgment creditor to the extent of the beneficial interest enjoyed by the debtor (*i.e.*, the rents and profits), and that when the mortgagees at a subsequent period entered into possession, that interest had been determined, and the rights of the tenant by elegit suspended or extinguished (*b*).

It is now provided that a judgment is not to operate as a charge

(*n*) *Hatton v. Haywood*, L. R. 9 Ch. 229, per Mellish, L. J.

(*o*) *Ramsbottom v. Buckhurst*, 2 M. & S. 565.

(*p*) *Lloyd v. Davies*, 2 Exch. 103.

(*q*) *Id.*; *Rogers v. Pitcher*, 6 Taunt. 202, per Gibbs, C. J. As to attornment, see *post*, p. 462.

(*r*) *Sharp v. Key*, 8 M. & W. 379.

(*s*) *Arnold v. Ridge*, 13 C. B. 745, F.

where the operation of a statute was held to prevent this result.

(*t*) *Doe v. Wharton*, 8 T. R. 2.

(*u*) *Doe v. Greenhill*, 4 B. & A. 684; *Mayor of Poole v. Whitt*, 15 M. & W. 571.

(*x*) *Harris v. Booker*, 4 Bing. 96.

(*y*) 1 & 2 Vict. c. 110, s. 11; *Bull v. Faulkner*, 1 De G. & S. 685.

(*z*) *Whitworth v. Gaugain*, 1 Ph. 728.

(*a*) Per Stirling, J., in next-cited case.

(*b*) *Johns v. Pink*, [1900] 1 Ch. 296.

on land or on any interest in it (c) unless the writ of execution is duly registered (d); and that every such writ, and every delivery of land in execution in pursuance thereof, is to be void against a purchaser for value unless the writ is duly registered (e). When the writ has been registered (f), and the land actually delivered in execution (g), the execution creditor may apply to the Court by originating summons for an order for the sale of the debtor's interest in the lands (h).

Except in the case (i) where the legal estate is vested in a trustee for the sole benefit of the debtor, equitable interests—e.g., an equity of redemption—cannot be taken under an *elegit* (k). But now such interests—even in the case of joint tenancies (l)—can be taken in execution by the appointment of a receiver (m) without the necessity of suing out an *elegit* at all, and such appointment amounts to a delivery of the land in execution within the statute of 1864 (n). Nor will the fact that the debtor is possessed of other property which can be reached by *elegit* in itself disentitle the creditor to such appointment until he has exhausted his legal remedy (o). The Judicature Acts, however, do not give jurisdiction to make such appointment in cases where prior to those Acts it could not have been made (p). The order appointing the receiver must now be registered (q).

(C.) *Bankruptcy.*

In the absence of a clause of re-entry on the happening of bankruptcy (r), the leasehold property of a debtor vests in that contingency—i.e., upon adjudication, for the mere making of a receiving order does not divest the estate from him (s)—in his trustee as from the time of his appointment or of the order of

(c) Within 1 & 2 Vict. c. 110, s. 13.

(d) 63 & 64 Vict. c. 26, s. 2. Such registration is to be under s. 5 of the Lands Charges Regn. Act, 1888 (51 & 52 Vict. c. 51).

(e) 63 & 64 Vict. c. 26, s. 3, incorporating 51 & 52 Vict. c. 51, s. 6.

(f) See *In re Pope*, 17 Q. B. Div. 743.

(g) *In re Cowbridge Ry. Co.*, L. R. 5 Eq. 413.

(h) 27 & 28 Vict. c. 112, s. 4 (as modified by R. S. C. 1883, O. 55, r. 9B; r. 24 of R. S. C. 1893); *In re Martin*, W. N. 1894, p. 223; *In re Harrison & Bottomley*, [1899] 1 Ch. 465.

(i) Cf. *supra*, at note (u).

(k) *Hatton v. Haywood*, L. R. 9 Ch. 229.

(l) *Hills v. Webber*, 17 T. L. R. 513.

(m) Cf. p. 448, *supra*.

(n) *Ex parte Evans*, 13 Ch. Div. 252; *In re Pope*, *supra*; *Cadogan v. Lyric Theatre*, [1894] 3 Ch. 338.

(o) *Hills v. Webber*, *supra*.

(p) *Holmes v. Millage*, [1893] 1 Q. B. 551; *Harris v. Beauchamp*, [1894] 1 Q. B. 801.

(q) 51 & 52 Vict. c. 51, s. 5; 63 & 64 Vict. c. 26, s. 2.

(r) See p. 319, *ante*.

(s) *In re Smith*, [1893] 1 Q. B. 323; *In re Berry*, [1896] 1 Ch. 939.

adjudication (*t*): a rule which applies even to a tenancy from year to year (*u*), and which, as has already been seen (*x*), extends to the right to claim a lease conferred upon the debtor in an agreement. Subject to the right of disclaimer, to be presently considered, the trustee becomes, like any other assignee (*y*), personally liable in respect of the covenants of the lease, though not for any breach occurring before his appointment (*z*); no possession, beneficial or otherwise, is necessary (*a*), nor is any formal act showing an election to accept the lease (*b*). With regard, therefore, to rent which has already accrued due before that date he cannot be made liable (*c*); whilst with regard to that which has accrued subsequently his liability has been held, by force of the Apportionment Act, to be confined to an amount apportioned from that date (*d*). In addition, too, to his power of disclaimer, he may, like any other assignee (*e*), assign over (*f*), even though such re-assignment be to a "man of straw," for the express purpose of ridding himself of his liability (*g*), and even where the lease forbids assignment without the lessor's consent (*h*). Nor does it make any difference that the assignment so forbidden expressly extends to the act of any person who may thereafter claim any estate or interest in the premises by operation of law (*i*).

The question as to the trustee's position with regard to fixtures and tenant-right will be considered hereafter (*j*). The effect, in the case of bankruptcy, of the tenant's covenant not to remove produce from the premises (*k*) has already been explained (*l*).

Disclaimer.—The right of disclaiming property of a leasehold nature—which right it has been held can be exercised even as

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 54.

(*u*) See, e.g., *Alloway v. Steere*, 10 Q. B. D. 22; *Gabriel v. Blankenstein*, 13 Q. B. D. 684. As to the legal position in such case where, there being no interference by the trustee, the landlord allows the tenant to continue in possession, and receives rent from him, see *Mackay v. McGuire*, [1891] 1 Q. B. 250; referred to *ante*, pp. 2, 395.

(*x*) See p. 371, *ante*.

(*y*) *Supra*, p. 427.

(*z*) *Titterton v. Cooper*, 9 Q. B. Div. 473; *Stein v. Pope*, [1902] 1 K. B. 595, per Bomer, L. J. As to his discharge by release, see *seot.* 82, and *Ex parte Carter*, 8 Ch. Div. 731; *Ex parte Barnard*, 46 L. T. 824.

(*a*) *Titterton v. Cooper*, *supra*, per Cotton, L. J.

(*b*) *Wilson v. Wallani*, 5 Ex. D. 155.

(*c*) *Titterton v. Cooper*, *supra*.

(*d*) *In re Wilson*, 62 L. J. Q. B. 628. See, however, *ante*, p. 124.

(*e*) *Supra*, pp. 427, 428.

(*f*) *Ex parte Buxton*, 15 Ch. Div. 289.

(*g*) *Hopkinson v. Lovering*, 11 Q. B. D. 92; *Onslow v. Corrie*, 2 Madd. 330; *Wilkins v. Fry*, 1 Mer. at p. 265.

(*h*) *Doe v. Bevan*, 3 M. & S. 353; *Doe v. Smith*, 5 Taunt. 795; *Winter v. Dumergue*, 14 W. R. 281, 699.

(*i*) *Re Johnson*, 70 L. T. 381.

(*j*) *Post*, pp. 709, 725.

(*k*) Before 1st Jan. 1909: see *ante*, p. 294.

(*l*) *Ante*, pp. 293-4.

against the Crown (*m*)—is conferred upon the trustee by the 55th section (*n*) of the Bankruptcy Act (*o*), which provides that the trustee, notwithstanding that he has endeavoured to sell, or has taken possession of the property or exercised any act of ownership in relation thereto, may by writing signed by him (*p*) disclaim the property (*q*). (The section also contains a clause (*r*) empowering any person who is, as against the trustee, entitled to the benefit or subject to the burden of a contract made with the bankrupt, to apply to the Court (*s*) to make an order *rescinding* the contract on such terms as to payment by or to either party of damages for the non-performance of the contract or otherwise as to the Court may seem equitable, and providing that any damages payable under the order to any such person may be proved by him as a debt under the bankruptcy (*t*).) The object of disclaimer is to enable the trustee to get rid of burdensome property; and the mere fact that it may be more beneficial to the estate that a contract should not be carried out is not a sufficient ground for the exercise of the right (*u*).

It may be added that it is not the effect of the Judicature Act, 1875, s. 10, which assimilates the rules in the winding-up of a company, as to debts and liabilities provable, to those in bankruptcy, to confer the benefit of the disclaimer clause on the liquidator (*x*).

The effect of the whole section—which applies, where no trustee has been appointed (*y*), to the official receiver (*z*), and which also applies to the administration in bankruptcy (*a*) of the estate of a deceased insolvent (*b*)—may be considered as follows:—

(*m*) *In re Thomas*, 21 Q. B. D. 380 (reported as *In re Trotter*, 57 L. J. Q. B. 574).

(*n*) There seems to be nothing in the section to prevent its clauses from applying to bankruptcy as well of a landlord as of a tenant, in the case—not impossible, though perhaps improbable—of a reversion rendered unprofitable by reason of onerous covenants in a lease.

(*o*) 46 & 47 Vict. c. 52. For forms of disclaimer and notice thereof, see App. to Bankruptcy Rules, 1890, Nos. 120, 120A (amended by order of Board of Trade, 16th March, 1894), 120B, 120C, 120D.

(*p*) In *Wilson v. Wallant*, 5 Ex. D. 155, the requirement (in the Act of 1869) of writing “under his hand” was held not to be satisfied by the signature of his solicitor. It is thought that under the words of the present Act the signature of any authorized agent

would be sufficient: see *In re Whitley*, 32 Ch. Div. 337.

(*q*) Sub-s. (1).

(*r*) Which would seem to be applicable from its terms to leases and agreements for leases.

(*s*) The application is to a registrar in bankruptcy: rule 1 of Judge's Order of 25th March, 1885.

(*t*) Bankruptcy Act, s. 55, sub-s. (5).

(*u*) *In re Bastable*, [1901] 2 K. B. 518.

(*x*) See *In re Westbourne Grove Drapery Co.*, 5 Ch. D. 248.

(*y*) Sect. 54.

(*z*) See *In re Baker*, 8 Morr. 116. The official receiver is not, for the exercise of the right to disclaim, subject to the limitation of time which (*infra*, p. 453) affects the trustee: *In re Cohen*, [1905] 2 K. B. 704.

(*a*) Sect. 125.

(*b*) *In re Mellison*, [1906] 2 K. B. 68.

What property.—The right of disclaimer as regards property of a leasehold nature extends not merely to property of the bankrupt divisible amongst his creditors, but even to that which is affected by a trust (as a lease which he has agreed to assign), and from which no benefit can accrue to his estate (c). But it does not extend to property in respect of which the trustee can incur no liability either by privity of contract or privity of estate (d), e.g., where the lessee has before his bankruptcy assigned the premises by way of mortgage to the lessor for the entire residue of the term (e). Whether it extends to leaseholds acquired by a bankrupt after his bankruptcy is a question which has been raised but not decided (f). An agreement for a lease, for the purposes of this section, stands on the same footing as a lease (g). The existence of an attornment clause will bring a mortgage deed within the section (h). The fact that the lease has expired does not prevent a disclaimer (i), and this probably even where it has expired before the appointment of the trustee (k). A disclaimer must include the *whole* of the property comprised in the lease (l).

Time for disclaimer.—The trustee has now, for the purpose of disclaimer, twelve months from the time of the first appointment of a trustee (m), or, if the existence of the property should not have come to the knowledge of the trustee within one month after such appointment, twelve months from the time he first became aware of it (m). Such period, too, may be extended by the Court (m); but some good reason for this indulgence must be forthcoming, and if the rights of other parties would be prejudiced by its being granted, the Court will, in general, put the trustee upon terms (n). Where it is clear, however, that the landlord has really suffered no damage, the time for disclaimer will generally be extended (o). The time runs from the date of the certificate of the appointment of the trustee, and not from the date of the order of adjudication (p).

(c) *In re Maughan*, 14 Q. B. D. 956; *Ex parte Edmonds*, 48 L. T. 77.

(d) *In re Gee*, 24 Q. B. D. C5.

(e) *Id.* *Secus*, in a mortgage to a third party by way of underlease: *In re Wilson*, L. R. 13 Eq. 186.

(f) *In re Clayton and Barolay*, [1895] 2 Ch. 212.

(g) *In re Maughan*, *supra*; *Ex parte Llynvi Coal Co.*, L. R. 7 Ch. 28.

(h) *Ex parte Isherwood*, 22 Ch. Div. 384.

(i) *Ex parte Paterson*, 11 Ch. Div. 908.

(k) *Ex parte Dyke*, 22 Ch. Div. 410.

(l) *Ex parte Glegg*, 19 Ch. Div. 7 (reported as *Ex parte Gregg*, 51 L. J. Ch. 367); *Ex parte Allen*, 20 Ch. Div. 341.

(m) 53 & 54 Vict. c. 71, s. 13.

(n) *In re Price*, 13 Q. B. D. 466.

(o) *In re Baker*, 8 Morr. 116.

(p) *In re Cohen*, [1905] 2 K. B. 704.

Restriction upon right to disclaim.—The trustee is not entitled to disclaim where an application in writing has been made to him by any person interested in the property (*e.g.*, the landlord (*g*)) requiring him to decide whether he will disclaim or not (*r*), and the trustee has for twenty-eight days after its receipt, or such extended period as may be allowed by the Court, declined or neglected to give notice whether he disclaims or not (*s*). Proof of posting by prepaid letter would now be sufficient evidence, on the part of the landlord, of the delivery of such application where denied by the trustee (*t*), though before the present Act this was not the case (*u*). An application to extend the time under this section should, in the absence of special circumstances, be made within the twenty-eight days (*x*); but the right of the lessor to have his requisition answered within that time may be waived by him (*y*). On the other hand, the fact that he has, under the terms of the lease, compelled the trustee to pay rent in advance is not of itself a ground for enlarging the time after its expiration (*z*). An application, however, for leave to disclaim after such expiration has been granted, even without special reasons for indulgence, conditionally upon the trustee paying rent and costs personally (*a*).

Disclaimer without leave.—This may be done both where the bankrupt has not sub-let the premises or any part of them or created a mortgage or charge upon the lease, and where he has done so (*b*). In the *former* case, no leave to disclaim is necessary if any one of the three following conditions be fulfilled:—(a) If the rent reserved and real value of the property leased, as ascertained by the property tax assessment, are less than 20*l.* per annum. (b) If the estate is administered as a “small bankruptcy” within sect. 121 of the Act. (c) If the trustee serves the lessor with notice (*c*) of his intention to disclaim, and the lessor does not, within seven days after receipt, give notice (*d*) to the trustee requiring him to bring the matter before the Court (*e*).

(*g*) *In re Page*, 14 Q. B. D. 401; *In re Finley*, 21 Q. B. Div. 475, per Lindley, L. J.

(*r*) Such a requisition may, where no trustee has been appointed, be made to the official receiver: *In re Cohen*, [1905] 2 K. B. 704.

(*s*) 46 & 47 Vict. c. 52, s. 55, sub-s. (4).

(*t*) Sect. 142.

(*u*) *Reed v. Harvey*, 5 Q. B. D. 184.

(*x*) *Ex parte Lovering*, L. R. 9 Ch. 586.

(*y*) *Ex parte Moore*, 2 Ch. Div. 802.

(*z*) *In re Richardson*, 16 Ch. D. 613.

(*a*) *In re Page*, 14 Q. B. D. 401.

(*b*) Bankruptcy Rules, 1890, r. 69 (r. 320 of General Rules).

(*c*) See Form No. 119A, in App. to Rules of 1890.

(*d*) See Form No. 120 E.

(*e*) Bkcy. Rules, 1890, r. 69, sub-r. (1).

In the *latter* case, no leave is necessary if the trustee serve the lessor and the sub-lessee, or the mortgagees, with notice (*f*) of his intention to disclaim, and none of them within fourteen days require the matter to be brought before the Court (*g*). But a disclaimer made without leave is not affected on the ground only that such notice has not been given to some person who claims to be interested in the demised property (*h*). In cases of disclaimer without leave the Court has no power to award any compensation to the landlord for the occupation by the trustee, even though a benefit may have thereby resulted to the estate (*i*).

Disclaimer with leave.—In cases other than the foregoing the disclaimer of a lease without the leave of the Court is void (*k*). And when leave is applied for (*l*), the Court may require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures (*m*), tenant's improvements (*n*), and other matters arising out of the tenancy, as the Court thinks just (*o*). Such notices may be served if necessary out of the jurisdiction (*p*). It is settled that in deciding whether leave should be granted or not regard should be had only to the question whether the disclaimer would be for the benefit of the bankrupt's estate, and not to the question whether injury would be caused to third parties (*q*). In applying to the Court for leave to disclaim, the trustee may include in one application several distinct premises, so long as there is one landlord or chief respondent who is affected by the whole application, although there may be other respondents who are only affected by part of it (*r*).

Once the disclaimer has been executed, the bankrupt's estate in the property is determined (*s*); consequently no appeal from an order giving leave to execute it can then be brought, either by the landlord himself (*t*), or by any other person claiming an interest in the property (*u*).

(*f*) See Form No. 119 B.

(*g*) Bankruptcy Rules, 1890, r. 69, sub-r. (1). As to costs if they do so require, see sub-r. (5).

(*h*) R. 69, sub-r. (6). Persons claiming to be interested may be required to furnish the trustee with statements of their interest: sub-r. (7).

(*i*) *In re Sandwell*, 14 Q. B. D. 960.

(*k*) Bankruptcy Rules, 1890, r. 69, sub-r. (3).

(*l*) The application is to a registrar in bankruptcy: rule 1 of Judge's Order

of 25th March, 1885. As to costs, see *In re Procter*, [1891] 2 Q. B. 433.

(*m*) See *post*, p. 709.

(*n*) See *post*, p. 725.

(*o*) Bankruptcy Act, s. 55, sub-s. (3).

(*p*) *In re Rathbone*, 56 L. J. Q. B. 504.

(*q*) *Ex parte East and West India Dock Co.*, 17 Ch. Div. 759.

(*r*) *In re Whitaker*, 21 Q. B. D. 261.

(*s*) See *infra*, p. 456.

(*t*) *Ex parte Sailer*, 19 Ch. Div. 122.

(*u*) *In re Woods*, 3 Ch. Div. 459 (reported as *Re Wood*, 45 L. J. Bkcy. 141).

As regards the terms to be imposed, the lessor is not to be recouped for all he has lost, but must suffer with the other creditors (*x*); and a demand by him of rent will not be entertained (even though the trustee might have disclaimed earlier), unless he has been kept out of the property for the benefit of the creditors, who have consequently obtained some advantage at his expense (*y*). But if advantage have been derived by them (and not merely by the debtor) from the use of the property, the trustee will, as a rule, be required to pay rent from the order of adjudication (*z*). The rule, however, which prevailed under the Act of 1869 (*a*), that regard is to be had, not merely to the actual benefit which has resulted to the estate from the trustee's occupation, but to the question whether the possession was retained by him *with the view of obtaining* a profit for the estate (*b*), would seem still to be applicable; for the governing principles in relation to this matter appear to be the same under the two Acts, inasmuch as though the disclaimer is no longer thrown back for all purposes to the date of adjudication (*c*), it discharges the trustee (*d*) as from the date when the property vests in him (*e*). In the case of an attorney in a mortgage deed regard must, in this particular, be paid to the fact that the real relation between the parties is not that of landlord and tenant, but that of mortgagee and mortgagor (*f*). Where the bankrupt had entered into a binding agreement to assign his interest in the premises, the trustee, as a condition of being allowed to disclaim, was required to execute the assignment, subject, however, to receiving an indemnity from the assignee (*g*).

Leave to disclaim may always be refused on special grounds. Thus, where the trustee had undertaken duties as agent for sub-lessees of the property which conflicted with his duties to the bankrupt's estate, leave to disclaim, in the absence of evidence showing on what proper terms it could be granted, was refused altogether (*h*).

Operation of disclaimer.—A disclaimer operates to determine, as from its date (*i*), the rights, interests, and liabilities of the bankrupt

(*x*) *In re Brooke*, 1 Morr. 82, per Cave, J.

(*y*) *In re Zappert*, 1 Morr. 72.

(*z*) *In re Brooke*, *supra*.

(*a*) 32 & 33 Vict. c. 71, s. 23.

(*b*) *Ex parte Good*, 13 Q. B. Div. 731; *Ex parte Ladbury*, 17 Ch. Div. 532; *Ex parte Isherwood*, *infra*; *Ex parte Izard*, 23 Ch. Div. 115; *Ex parte Arnal*, 24 Ch. Div. 26.

(*c*) Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 23.

(*d*) See under next head.

(*e*) See next-cited case, per Cotton, L. J.

(*f*) *Ex parte Isherwood*, 22 Ch. Div. 384.

(*g*) *Ex parte Edmonds*, 48 L. T. 77.

(*h*) *In re Crowther*, 4 Morr. 100.

(*i*) See at note (*c*), *supra*.

and his property in, or in respect of, the disclaimed property, and also to discharge the trustee from all personal liability (*k*) in respect of it as from the date when it vested in him; but not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, to affect the rights or liabilities of any other person (*l*). Hence where, for instance, the assignee of a lease becomes bankrupt, and his trustee disclaims, the liability of the original lessee on the covenants is unaffected (*m*). So, where the bankrupt has made an underlease the disclaimer will not prevent the lessor from distraining for his rent on the underlessee, or from re-entering for breach of the lessee's covenants in the lease (*n*). But where the lessee has not created a sub-interest, and becomes bankrupt, the effect of this enactment, as it has been held, is to put an end to the lease altogether as between him and the lessor, and consequently to discharge a surety for him for the rent (*o*) as from the time of the disclaimer, this result being held to be "necessary for the purpose of releasing the bankrupt and his property . . . from liability" (*p*). The meaning of the above provision is that the trustee may, by disclaiming, relieve himself from future liabilities under the lease, but not that such disclaimer will relieve him from the consequences of an act in contravention of the terms of the lease (*e.g.*, selling hay off the premises) which he has already committed (*q*). A disclaimer, moreover, has no operation until it has been filed in Court by the trustee (*r*).

Any person injured by the operation of a disclaimer is to be deemed a creditor of the bankrupt to the extent of the injury, and may prove accordingly in the bankruptcy (*s*). Thus, where

(*k*) Cf. *supra*, p. 451.

(*l*) Bankruptcy Act, 1883, s. 55, sub-s. (2).

(*m*) *Hill v. East and West India Dock Co.*, 9 App. Ca. 448 (decided under the Act of 1869). Consequently, a surety for the assignee still remains liable to the lessee: *Harding v. Preece*, 9 Q. B. D. 281 (decided under the Act of 1869).

(*n*) *Ex parte Walton*, 17 Ch. Div. 746 (decided under the Act of 1869).

(*o*) This result, it may be observed, has also been reached (though, of course, by a wholly different road) in the case of dissolution of a company after liquidation: *Hestings (Mayor of) v. Letton*, 23 T. L. R. 456.

(*p*) *Stacey v. Hill*, [1901] 1 K. B. 660, C. A. It will be noticed that the

liability of the bankrupt to the surety on his implied undertaking of indemnity did not arise directly out of the disclaimed transaction at all, but out of the collateral contract of guarantee. Nor does it appear that the right of the surety to apply for a vesting order (see sub-s. (6), *infra*) was referred to. The decision appears also to be in direct conflict with the opinion of James, L. J., in *Ex parte Walton*, 17 Ch. Div. at pp. 755-6, as to the policy of the bankruptcy law.

(*q*) *Schofield v. Hincks*, 58 L. J. Q. B. 147.

(*r*) Bankruptcy Rules, 1890, r. 69, sub-r. (4). As to particulars in the disclaimer, see *id.*

(*s*) Bankruptcy Act, 1883, s. 55, sub-s. (7).

premises are disclaimed, the lessor may prove for the difference between the amount of rent fixed by the lease and the amount obtainable for the property during the remainder of the term (*i*). So, where a house was let on a repairing lease for twenty-one years, with power to the lessee to "break" at seven or fourteen years on giving six months' notice, and upon his bankruptcy his trustee disclaimed more than six months before the end of the first seven years, it was held that the lessor was entitled to prove for diminution in rent up to the end of that period, and the amount necessary to put the premises in repair (*u*). Similarly the assignee of a repairing lease, under a covenant to indemnify the lessee, who re-assigns, also with a covenant of indemnity, to a person who becomes bankrupt during the currency of the lease, may, upon disclaimer by the trustee, prove for the damage he has sustained; and where the premises in such a case were depreciated in letting value and out of repair, such damage was held to include, in addition to the amount of the dilapidations, the loss of certain instalments of rent (so as to allow time to repair and re-let the premises) and the diminution in letting value for the remainder of the term (*x*). And where the lessee before his bankruptcy has granted an underlease at a less rent than that reserved by the lease, the underlessee, upon being called upon to pay the original rent to the lessor (*y*), may prove in the lessee's bankruptcy for the difference (*z*). Where a lease, granted to persons as joint tenants, of premises to be used for the purposes of a partnership business (*a*) contained joint and several covenants to pay rent and to repair, it was held, upon disclaimer by the trustee, that the lessor was entitled to prove for the injury he had sustained against the separate estate of each of the partners (*b*).

Vesting order in owner of sub-interest.—On application (*c*) by any person, either claiming an interest in any disclaimed property, or under a liability not discharged by the Act in respect of any such property, and on hearing such persons as it thinks fit (*d*), the Court may make an order vesting the same in him or in any other person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid,

(*i*) *Ex parte Llynvi Coal Co.*, L. R. 7 Ch. 28.

(*u*) *Ex parte Blake*, 11 Ch. Div. 572.

(*x*) *In re Carruthers*, 15 R. 317.

(*y*) See *supra*, at note (*n*).

(*z*) *Ex parte Walton*, 17 Ch. Div. 746.

(*a*) See *ante*, p. 69.

(*b*) *Ex parte Corbett*, 14 Ch. Div. 122.

(*c*) The application, if opposed, is to a registrar in bankruptcy: rule 1 of Judge's Order of 25th March, 1885.

(*d*) *In re Morgan*, cited *infra*, p. 460.

or a trustee for him, and on such terms as the Court thinks just ; and no conveyance or assignment for the purpose is necessary (*e*). But it is provided that where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as underlessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities as the bankrupt was subject to himself under the lease at the time his petition was filed ; and any mortgagee or underlessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property (*e*).

The Court, however, may, if it think fit, so far modify this requirement as to make the person in whose favour the vesting order may be made subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the petition was filed, and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order (*f*). And though this statutory provision does not in terms confer power on the Court to graduate the conditions upon which the vesting order may be made, in effect that result is achieved, since the Court is enabled to enforce this provision if the lessor decline to do what it considers to be just and reasonable (*g*). It has been laid down for a general rule that the discretion of the Court under it will be exercised in favour of the person claiming under the bankrupt when it will place him in no better position, and the lessor at the same time in no worse position (*h*), than if no disclaimer had taken place (*i*). If there be no person claiming under the bankrupt who is willing to accept an order on the above terms, the Court shall have power to vest the bankrupt's estate and interest in the property in any person liable, either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt (*k*).

(*e*) Bankruptcy Act, 1883, s. 55, sub-s. (6).

(*f*) 53 & 54 Vict. c. 71, s. 13.

(*g*) *In re Walker*, 64 L. J. Q. B. 783.

(*h*) Attention was pointedly drawn by the Court, in the case next cited, to the fact that there was no restriction in the lease upon assignment by the lessees, or clause of re-entry on their bankruptcy.

(*i*) *In re Carter and Ellis*, [1905] 1 K. B. 785. Having regard, however, to the fact that if no disclaimer takes place the trustee may always assign to a wholly impecunious person (*supra*, p. 451), the application of the test here suggested would seem to present difficulties.

(*k*) Bankruptcy Act, 1883, s. 55, sub-s. (6).

The effect of this enactment is that, upon the bankruptcy of the lessee, either the lessor or the sub-lessee can apply for an order vesting the property in the sub-lessee subject to the covenants and conditions of the lease; that if the sub-lessee declines to take it on those terms he will be excluded from all interest in the property; that the property may thereupon be vested, freed from all the bankrupt's interest therein, in any person (if there be one) who may be liable upon the covenants of the lease (*e.g.*, a surety); and that if no vesting order be made, both lease and sub-lease will be determined and the lessor will take the property freed from both (*l*).

It is not a condition precedent to the making of the order that every person who has an interest in, or who is under liability in respect of, the property should be served with notice of the application; but the Court has a discretion to direct which of the persons entitled to apply for the order shall be served, and if in its opinion the applicant has not served all the persons who ought to be served he may be ordered to pay the costs occasioned by his default (*m*). It would seem, moreover, now that the determination of the position, with regard to the lessor, of the party obtaining the order is in the discretion of the Court (*n*), that the lessor should always be served with notice of the application (*m*). A party who is not served is not prejudiced by the making of an order under the section, and will not be prevented from afterwards himself applying for a vesting order in case the party against whom the earlier application is made decline to take such order (*o*).

It has been decided, too, that the lessor himself is a person "claiming an interest" in the property within the meaning of the above provisions (*p*), and that upon being served with a notice of an application by the trustee for leave to disclaim, he is entitled to serve a notice of motion for a vesting order on the parties interested, without waiting till leave to disclaim is actually given; though he does this at the risk of costs if leave to disclaim be refused, or if it should prove that notwithstanding its being granted he is not entitled to a vesting order (*q*). He has, however, a *prima facie* right to such an order on leave to disclaim being given if he succeeds in bringing himself within the above sub-section, but the Court has a discretion to refuse it (*q*). The fact

(*l*) *In re Finley*, 21 Q. B. Div. 475; *Ex parte Shilson*, 20 Q. B. D. 343.

(*m*) *In re Morgan*, 22 Q. B. Div. 592.

(*n*) 53 & 54 Vict. c. 71, s. 13, *supra*.

(*o*) *In re Baker*, [1901] 2 K. B. 628, cited *infra*.

(*p*) Cases cited in note (*l*), *supra*. (It had previously been thought otherwise: *In re Parker*, 14 Q. B. D. 405.)

(*q*) *Re Britton*, 61 L. T. 52.

that he may not be in a position to ask for an order vesting the property in himself will not prevent him from putting the machinery of the section in motion (*r*). And his right to call upon a sub-lessee to make his election under the section is not affected by the circumstance that the latter may be holding not under the lessee but under an assignee, so that there is a solvent intervening person liable upon the covenants of the lease (*r*). Where therefore demised premises were assigned and afterwards re-assigned, and the second assignee having made a mortgage by sub-demise became bankrupt and his trustee disclaimed, it was held that the mortgagees might be called upon, at the instance of the lessor, to exercise the option conferred by the section (*r*). It may be added that a mortgagee by demise cannot escape from the effect of the sub-section by making a sham assignment for the purpose (*s*).

In dealing with applications for vesting orders it seems clear that the Court of Bankruptcy is exercising a judicial discretion, and is not merely acting ministerially (*t*).

(*r*) *In re Baker*, [1901] 2 K. B. 628. (*s*) *In re Smith*, 25 Q. B. Div. 536.

(*t*) See *Lea v. Thursby*, [1904] 2 Ch. 57.

CHAPTER V.

ATTORNMENT.

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THE relationship of landlord and tenant may be created by attornment.

An attornment, in its strict sense, is an agreement of the tenant to a grant of the reversion made by the landlord to another (*a*), or, as it has been defined, "the act of the tenant's putting one person in the place of another as his landlord" (*b*): an act which under the feudal law was always necessary in order to render such grant valid (*c*). (This, however, applies only to cases of *transfer* of the reversion, and not to those of devise or descent (*d*).) But it has since been enacted (*e*) that "all grants or conveyances, by fine or otherwise, of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual to all intents and purposes without any attornment of the tenants of any such manors, or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made." As the direct result of this enactment, a person holding under a lease from another becomes at once tenant upon the same terms to any party who acquires the reversion from the latter (*f*). So, where a person entitled only in remainder on the determination of a life estate grants a lease for years to commence immediately, the lessee takes an immediate vested estate (and not a mere *interesse termini* (*g*)) carved out of the remainder, the statute rendering attornment by

(*a*) Co. Lit. 309 a.

(*b*) *Cornish v. Searell*, 8 B. & C. 471,
per Holroyd, J.

(*c*) See note to Co. Lit. 309 a.

(*d*) See *Doe v. Smith*, 8 A. & E. 255,
per Lord Denman, C. J.

(*e*) 4 Anne, c. 16, s. 9.

(*f*) *Brydges v. Lewis*, 3 Q. B. 603.

(*g*) See p. 20, *ante*.

the tenant of the particular preceding estate unnecessary (*h*). The statute, however, only applies where there is some privity of estate existing between the tenant and the new reversioner, and not where the former has, before the acquisition of the reversion by the latter, assigned over his interest to another person (*i*).

The statute in question goes on to provide (*k*) that "no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor, or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the conusee or grantee." The effect of this provision has already been considered (*l*). It has also been pointed out that where the lessor mortgages after demise the mortgagee is an assignee of the reversion within the above enactment (*l*). But in a mortgage before demise (such demise not being made under the provisions of the Conveyancing Act (*m*)) this is not the case; and, as has already been seen, the mortgagee must then obtain an attornment from the tenant, as mere notice to him to pay the rent to the mortgagee will not be sufficient to create a tenancy between them, so as to entitle the mortgagee to distrain or sue for the rent (*n*).

A further provision relating to attornments is contained in a later statute (*o*). Its effect is that all attornments made by tenants to strangers claiming title to the estates of their respective landlords shall be absolutely null and void to all intents and purposes whatsoever, and the possession of such landlords not deemed to be in any way changed or affected thereby; but this is not to "extend to vacate or affect any attornment made pursuant to and in consequence of some judgment at law or decree or order of a court of equity, or made with the privity and consent of the landlord or landlords, lessor or lessors, or to any mortgagee after the mortgage is become forfeited."

Attornment clauses in mortgage deeds.—In recent years the use of attornments, in consequence of the foregoing provisions, has been almost wholly restricted to mortgage deeds, the mortgagor agreeing, by an "attornment clause" in the deed, to hold the

(*h*) *Doe v. Brown*, 2 E. & B. 331. (*Edwards v. Wickwar*, L. R. 1 Eq. 403, *semb. cont.*, by reason of the statute being overlooked. See note to report in 35 L. J. Ch. 309.)

(*i*) *Alcock v. Moorhouse*, 9 Q. B. Div. 366.

(*k*) Sect. 10.

(*l*) *Ante*, p. 165.

(*m*) 44 & 45 Vict. c. 41, s. 18; *ante*, p. 61.

(*n*) *Evans v. Elliot*, 9 A. & E. 342; *ante*, p. 60.

(*o*) 11 Geo. 2, c. 19, s. 11.

mortgaged property as tenant at a specified rent to the mortgagee. In this case, as will be noticed, the relation of landlord and tenant is created between the parties immediately, and without any previous transfer of the reversion. The object of this practice is to place the mortgagee in a more favourable position, by securing to him the payment of principal and interest by means of the right of distress. Such a clause has often been held to be operative to create a tenancy carrying that right(*p*) between the parties(*q*), and this even if the deed has not been executed by the mortgagee(*r*). This construction, however, will not prevail if the general scope of the instrument be inconsistent with it(*s*), but it will prevail, at all events, where the attornment clause provides that the rent reserved under it is to be applied in satisfaction of the principal and interest(*t*): an intention which will be attributed to the deed, in the absence of express words to the contrary, even if the yearly rent it reserves is equal in amount to the yearly interest of the mortgage debt and is made payable on the same days(*u*).

An attornment clause in a mortgage deed is "deemed to be" a bill of sale(*x*), and hence will be void(*y*) unless it be registered(*z*); though not being actually a bill of sale(*a*), it need not be expressed in the scheduled form required by the later Act(*b*). And even if it be void for want of registration, yet the relation of landlord and tenant it has created between the parties is not thereby destroyed(*c*). For such a clause consists of two things perfectly severable; and though in so far as it gives power to distrain personal chattels it is a bill of sale and consequently void by the Bills of Sale Acts if unregistered(*d*), in so far as it creates the relation of landlord and tenant it is a matter affecting real estate, and is therefore untouched by those Acts(*e*).

(*p*) See *post*, p. 487.

(*q*) *Pinhorn v. Souster*, 8 Exch. 768; *Brown v. Metropolitan Counties, &c., Society*, 1 E. & E. 882; *Kearsley v. Philips*, 11 Q. B. Div. 621. And for further illustrations, see *post*, pp. 525, 602.

(*r*) *Morton v. Woods*, L. R. 4 Q. B. 293; *Ex parte Voisey*, 21 Ch. Div. 442.

(*s*) *Walker v. Giles*, 6 C. B. 662. (The actual decision in this case has been doubted: see *Turner v. Barnes*, 2 B. & S. 485.)

(*t*) *Pinhorn v. Souster*, *supra*; *Doe v. Davies*, 7 Exch. 89.

(*u*) *Ex parte Harrison*, 18 Ch. Div. 127, disapproving *Hampson v. Fellows*, L. R. 6 Eq. 575.

(*x*) Within 41 & 42 Vict. c. 31, s. 6.

(*y*) 45 & 46 Vict. c. 43, s. 8.

(*z*) *Green v. Marsh*, [1892] 2 Q. B. 330.

(*a*) As was once thought: see *In re Willis*, 21 Q. B. Div. 384.

(*b*) Per Kay, L. J., *Green v. Marsh*, *supra*.

(*c*) *Mumford v. Collier*, 25 Q. B. D. 279.

(*d*) Cf. p. 478, *post*.

(*e*) Per Wills, J., in last-cited case.

How distinguished from agreement.—A mere attornment does not, like an agreement, require a stamp (*f*). But an acknowledgment of the existence of a new tenancy for a term, and on conditions which do or may vary from those of the former, is not a mere attornment (*g*). So, where judgment in ejectment has been recovered against a tenant, the acceptance by him of a new title under a new party is not a mere attornment (*h*); but if such new party be only devisee (*i*) under the will of the successful party in ejectment, an acknowledgment of his title, though not strictly an attornment, does not require to be stamped as an agreement (*k*).

Where, again, an instrument contains other stipulations besides an acknowledgment of tenancy, *e.g.*, where it goes on to mention the rent, how it is payable, and how much is owing (and so virtually contains an undertaking to pay), it is not a mere attornment (*l*). But a mere admission by one party that premises belong to another, and that he has no interest in them, is an attornment and not an agreement, even though followed by an undertaking to give immediate possession when required, for such an undertaking is clearly superfluous (*m*).

Effect of attornment.—Upon an attornment taking place, the tenant continues to hold upon the same terms as he held of his former landlord (*n*). But an attornment to a mortgagee of premises before demise, who (the demise not being made under the Conveyancing Act (*o*)) claims by title paramount, creates only a tenancy from year to year (*p*), which has the effect of displacing the former tenancy, at least until the arrears due under the mortgage have been satisfied (*q*).

The effect of attornment as an estoppel will be considered in the next chapter (*r*).

(*f*) *Doe v. Edwards*, 5 A. & E. 95.

(*g*) *Cornish v. Searell*, 8 B. & C. 471.

(*h*) See per Lord Denman, C. J., in next-cited case.

(*i*) See p. 462, *supra*.

(*k*) *Doe v. Smith*, 8 A. & E. 255.

(*l*) *Doe v. Frankis*, 11 A. & E. 792. See per Littledale, J.

(*m*) *Barry v. Goodman*, 2 M. & W. 768.

(*n*) *Cornish v. Searell*, *supra*, per Holroyd, J.

(*o*) *Ante*, p. 61.

(*p*) *Corbett v. Plowden*, 25 Ch. Div. 678. The attornment here was by payment of rent.

(*q*) *Doe v. Boulter*, 6 A. & E. 675.

(*r*) See *post*, pp. 471—473.

CHAPTER VI.

ESTOPPEL.

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THE relation of landlord and tenant may arise by what is termed estoppel.

It is a principle of general application arising out of that relation that the tenant is estopped from disputing the title of his landlord. It is proposed to treat first of the estoppel as against the tenant, and subsequently to explain how the operation of the principle gives rise to *estates or tenancies by estoppel*. As against the tenant, there are two branches to the estoppel.

(A.) *With regard to the title of the person from whom the possession was actually obtained.*

So long as he retains possession, a tenant cannot dispute the title of the person who gave him that possession (a). "A tenant shall not contest his landlord's title: on the contrary, it is his duty to defend it; if he objects to such title, let him go out of possession" (b). This principle—which prevents a landlord from being called upon by his tenant to prove his title—applies generally, *e.g.*, in actions for rent (c) or upon other covenants of the lease (d), or for use and occupation (e), actions of trespass (f), of

(a) *Att.-Gen. v. Holtam*, T. & R. at p. 219, per Plumer, M. R. Most of the cases on this subject are collected in the notes to *Veale v. Warner*, 1 Wms. Saund. at pp. 580—582 (ed. 1871).

(b) *Doe v. Austin*, 9 Bing. 41, per Tindal, C. J.

(c) *Parker v. Manning*, 7 T. R. 537.

(d) *Cuthbertson v. Irving*, 6 H. & N. 135.

(e) *Dolby v. Iles*, 11 A. & E. 335; *Rennie v. Robinson*, 1 Bing. 147.

(f) *Delaney v. Fox*, 2 C. B. N. S. 768.

replevin (*g*), and of ejectment (*h*); it will prevent a tenant from obtaining any equitable relief if the effect of granting it would be to bring the landlord's title into dispute (*i*); nor will even an allegation that such title is tainted by fraud prevent its operation (*k*). But it applies only to cases of disputing *title*, and will not preclude a tenant from denying the right of his landlord to levy a distress for rent on the ground that he has no reversion left in him (*l*).

That the person, for example, from whom the tenant received the possession had previously conveyed the fee (*m*), or that he only possessed an equitable interest (*n*)—such as that of a mortgagor in possession (*o*),—or that he had previously demised to another for an interest which was still subsisting (*p*), or that he held under a grant from the Crown which was void (*q*), or that at the time of letting he was an undischarged bankrupt, so that the real landlord was his trustee (*r*),—are instances in point, of pleading on the part of a tenant which will not be permitted. The principle applies to all tenancies, whether for years, at will, or at sufferance (*s*), and whether such tenancies be created by deed (*t*) or not (*u*); it applies even to the case of mere licensees (*x*); nor does it make any difference, where the letting has been by an agent, that the landlord's name has remained unknown to the tenant (*y*). And the estoppel arises none the less because the lease itself shows a defective title in the lessor (*z*), or because he discloses that fact himself in evidence against the lessee (*a*).

The estoppel, however, lasts only so long as the lease is in force (*b*) and the tenant has not been evicted from the lands (*c*); but if possession of them be retained after its expiration the estoppel continues (*d*), except where the tenant is able to show that the lease was entered into by mistake and that the lands really belonged

(*g*) *Syllivan v. Stradling*, 2 Wils. 208; *Dancer v. Hastings*, 4 Bing. 2.

(*h*) *Doe v. Smythe*, 4 M. & S. 347.

(*i*) *Homan v. Moore*, 4 Price, 5.

(*k*) *Parry v. House*, Holt, N. P. C. 489.

(*l*) *Lewis v. Baker*, [1905] 1 Ch. 46.

(*m*) *Palmer v. Ekins*, 2 Ld. Ray. 1550.

(*n*) *Blake v. Foster*, 8 T. R. 487.

(*o*) *Alchorne v. Gomme*, 2 Bing. 54.

(*p*) *Phipps v. Sculthorpe*, 1 B. & A. 50.

(*q*) *Doe v. Abrahams*, 1 Stark. 305.

(*r*) *Cook v. Whellock*, 24 Q. B. Div. 658.

(*s*) *Doe v. Foster*, 3 C. B. 215, per Cresswell, J.; *Doe v. Skirrow*, 7 A. & E. 157.

(*t*) *Wilkins v. Wingate*, 6 T. R. 62.

(*u*) *Agar v. Young*, Car. & M. 78;

Phipps v. Sculthorpe, 1 B. & A. 50;

L. & N. W. Ry. Co. v. West, L. R. 2 C. P. 553.

(*x*) *Doe v. Baytop*, 3 A. & E. 188.

(*y*) *Fleming v. Gooding*, 10 Bing. 549, per Tindal, C. J.

(*z*) *Duke v. Ashby*, 7 H. & N. 600. Cf. p. 474, *infra*.

(*a*) *Dolby v. Iles*, 11 A. & E. 335.

(*b*) *James v. Landon*, Cro. Eliz. 36.

(*c*) Per Lord Blackburn, in *Clark v. Adie*, 2 App. Ca. at p. 435 (reported as *Clarke v. Adie*, 46 L. J. Ch. 598). As to eviction, see *ante*, pp. 166 *et seq.*

(*d*) See *Doe v. Austin*, 9 Bing. 41; *Cole, Ejec.* 215.

to him (e). And where a tenant after the expiration of his term enters into a new agreement with the same landlord for a further term and continues in possession, he is thereby estopped from disputing the landlord's *then* title (f). (Thus a new agreement from year to year has even been implied where a yearly tenant continued to occupy and pay rent after the expiration of his landlord's title, in order to raise the estoppel against a subsequent undertenant who was a mere stranger, not alleging he had any title himself (g).) But such an agreement is not equivalent to a fresh letting into possession, so as to estop him from showing that it was entered into by him in ignorance of the fact that the landlord's title had expired (h). Where, however, a tenant acquiesced in a direction given to him by his landlord to recognise another person claiming by title paramount as landlord in his place, this was held a fresh taking under the latter so as to estop the tenant from afterwards disputing his title (i).

The estoppel extends to all persons claiming under the tenant (k) —for instance, to an assignee (l), to an undertenant (m), to a person who obtains possession of premises from a tenant by paying him a sum of money (n) (though such person may apparently show an affirmative title in himself from which any title the landlord may have is derived (o)), to a party in an action of ejectment let in to defend (p) as landlord (q), or to any member of a company which has enjoyed the occupation of premises as tenant (r). The estoppel as against such persons is exactly the same as against the tenant himself (s). It does not, however, extend to the mere owner of goods which are on the demised premises by permission of the tenant, so as to prevent him from disputing the landlord's title in an action against him for illegal distress (t).

(e) *Clark (or Clarke) v. Adie*, *ubi sup.*; *Eliot v. Mayor of Bristol*, 71 L. T. 659 (reversed on appeal on another point, 72 L. T. 752); Co. Lit. 47 b.

(f) *Cole*, Ejec. 218, citing *Doe v. Burton*, 16 Q. B. 807.

(g) *L. & N. W. Ry. Co. v. West*, L. R. 2 C. P. 553.

(h) *Claridge v. Mackenzie*, 4 M. & Gr. 143; *Fenner v. Duplock*, 2 Bing. 10, per Best, C. J. Cf. p. 469, *infra*.

(i) *Hall v. Butler*, 10 A. & E. 204.

(k) *Barwick v. Thompson*, 7 T. R. 488; *Doe v. Fuller*, Tyr. & G. 17; *Doe v. Birchmore*, 9 A. & E. 662.

(l) *Taylor v. Needham*, 2 Taunt. 278; *Johnson v. Mason*, 1 Esp. 89.

(m) *Doe v. Beckett*, 4 Q. B. at p. 606,

per Lord Denman, C. J.; *L. & N. W. Ry. Co. v. West*, L. R. 2 C. P. 553.

(n) *Doe v. Mills*, 2 A. & E. 17.

(o) *Ford v. Ager*, 2 H. & C. 279. (In this case it will be noticed that the payment to the tenant was made after ejectment had been brought against him.)

(p) See *post*, p. 774.

(q) *Doe v. Smythe*, 4 M. & S. 347; *Doe v. Misem*, 2 Moo. & R. 56; *Doe v. Austin*, 9 Bing. 41; *Doe v. Birchmore*, *supra*.

(r) *Francis v. Doe*, 4 M. & W. 331, per Lord Denman, C. J.

(s) See *Doe v. Brown*, 7 A. & E. 447.

(t) *Tudman v. Henman*, [1893] 2 Q. B. 168.

On the other side, too, its benefit extends to all parties claiming under the person from whom the possession was received, so that their title may never be defeated by showing that such person had no title at the time he made the demise (*u*): for instance, to an assignee (*x*), or to a devisee (*y*), of the reversion. (But a tenant who is not, as against his lessor, estopped by his lease from denying a *particular estate* as having been in his lessor at the time of the demise, may deny it as against an assignee of the reversion who states it as part of his title (*z*); and although, when sued by the lessor, he cannot dispute the latter's title, yet, when sued by an assignee of the lessor, he may deny that the lessor had *such a title as could pass the right of action to the assignee* (*a*.) And for this purpose the interest of a tenant for life and of the reversioner is the same; so that a lessee of the former cannot as against the latter show adverse title at the time the lease was granted (*b*), except where the latter himself denies the right of the former to grant the lease (*c*). Nor can any plea be set up of which *the necessary effect* is to impeach the title of the person who gave the possession (*d*)—*i.e.*, his title at the time of the demise,—for, subject to this requirement being satisfied, the title both before (*e*) and after (*f*) that time may be disputed.

The latter principle is expressed by saying that it is always open to the tenant to show, either as against the person from whom the possession was obtained, or as against any one claiming under him, that the title of such person has expired or become defeated at a period subsequent to the demise (*g*); but it follows from what has just been said that such a plea will only be allowed provided it does not *ipso facto* involve an allegation that the title was defective at the time the demise was made, or, in other words, that no interest passed out of the lessor (*h*). The expression sometimes met with, that "there is no estoppel where an interest passes" (*i*), refers to the

(*u*) *Cuthbertson v. Irving*, 6 H. & N. 135; *Bringloe v. Goodson*, 4 Bing. N. C. 726.

(*x*) *Palmer v. Ekins*, 2 Ld. Ray. 1550; *Parker v. Manning*, 7 T. B. 537; *Gouldsworth v. Knights*, 11 M. & W. 337.

(*y*) *Driver v. Lawrence*, 2 W. Bl. 1259; *Doe v. Birchmore*, 9 A. & E. 632.

(*z*) Notes to *Spencer's case*, 1 Sm. L. C. at p. 100 (11th ed.), citing *Carrick v. Blagrove*, 1 B. & B. 531, and *Weld v. Baxter*, 1 H. & N. 568.

(*a*) *Seymour v. Franco*, 7 L. J. (O. S.) K. B. 18. Cp. *infra*, at note (*x*).

(*b*) *Doe v. Whitroe*, D. & Ry. (N. P.) 1.

(*c*) *Doe v. Langdon*, 12 Q. B. 711.

(*d*) *Rennie v. Robinson*, 1 Bing. 147.

(*e*) *Doe v. Powell*, 1 A. & E. 531.

(*f*) *Doe v. Edwards*, 5 B. & Ad. 1065.

(*g*) *Hopcraft v. Keys*, 9 Bing. 613. (*Balls v. Westwood*, 2 Camp. 11, may now be regarded as overruled; see *Mountney v. Collier*, 1 E. & B. 630.)

(*h*) *Hill v. Saunders*, 2 Bing. 112; affirmed on appeal, 4 B. & C. 529; *Doe v. Seaton*, 2 C. M. & R. 728; *Agar v. Young*, Car. & M. 78. Cf. *infra*, p. 474.

(*i*) Com. Dig. Estoppel (E. 8).

same principle, for its meaning is that the person accepting a lease, though estopped from saying that it passes no estate at all, is not estopped from saying that it does not pass so great an estate as it purports to convey (*k*),—i.e., so great an estate in point of duration (as just mentioned), for he is always estopped from saying that it is not so great in point of quantity (*l*).

It is always, for instance, permissible to prove that the landlord has parted with the reversion since the demise (*m*), or that he was only a termor and that his term has expired (*n*), or that the lessor was only entitled during the life of another who has since died (*o*), or (as against a devisee) tenant for his own life and that he is dead (*p*): a plea which will even enable him to retain possession as against such devisee, though the lease contain an express covenant to deliver up possession at the end of the term to the lessor, his heirs and assigns (*q*). And the conduct of the landlord may, as against himself, amount to an admission that the tenancy has expired and so prevent him from denying this afterwards; as when he tells the tenant that he has sold his interest in the premises (*r*), or notifies to the tenant his consent to another person receiving future rent (*s*) (unless such consent be given under a misapprehension (*t*)), or acquiesces in a transaction by which the tenant becomes lessee to another person (*u*).

Subject, too, to what has just been stated, the fact that any person claiming through or under the person from whom the possession was obtained has a good *derivative* title as assignee, &c., may always be disputed (*x*); nor will even subsequent acts of recognition of such person by the tenant (e.g., payment of rent to him) raise the estoppel if such acts have been done under a mistake as to the facts (*y*).

(*k*) 2 Sm. L. C. at p. 750, notes to *Doe v. Oliver*.

(*l*) *Weeks v. Birch*, 69 L. T. 759.

(*m*) *Harmer v. Bean*, 3 C. & K. 307.

(*n*) *England v. Slade*, 4 T. R. 682.

(*o*) *Doe v. Ramsbotham*, 3 M. & S. 516.

(*p*) *Doe v. Seaton*, *supra*; *Brudnell v. Roberts*, 2 Wils. 143.

(*q*) *Doe v. Seaton*, *supra*.

(*r*) *Doe v. Watson*, 2 Stark. 230.

(*s*) *Downs v. Cooper*, 2 Q. B. 256.

(*t*) *Williams v. Bartholomew*, 1 B. & P. 326; *ante*, p. 159.

(*u*) *Neave v. Moss*, 1 Bing. 360.

(*x*) *Doe v. Clarke*, 14 East, 488; *Phillips v. Pearce*, 5 B. & C. 433; *Doe v. Brown*, 7 A. & E. 447.

(*y*) *Doe v. Barton*, 11 A. & E. 307; *Jew v. Wood*, Cr. & Ph. 185, per Lord Cottenham, L. C. This, as will be seen, follows the rule of the next-cited class of cases.

(B.) *With regard to the title of a person from whom the possession was not obtained, but who has been recognised as landlord by the tenant.*

Such recognition (*z*) may be either by express agreement (*a*), by attornment (*b*) or other formal acknowledgment (as by paying a nominal sum of money (*c*)), by payment of rent (*d*) or of a nominal sum *as* rent (*e*), or by submission to a distress (*f*). And where such payment is to an agent who pays it over to his principal, it makes no difference that the principal has remained undisclosed (*g*). Where, for example, the assignee of a lease, after mortgaging his interest by sub-demise, became bankrupt (the trustee afterwards disclaiming the lease), and the mortgagee thereupon went into possession, informing the lessor of the fact, and paying the rent reserved by the lease for a number of years (on several occasions being sued for it and submitting to judgment), it was held that in the absence of other evidence (*h*) a yearly tenancy was established between the parties by estoppel (*i*). The estoppel in these cases seems to be founded on a representation by the tenant arising from his act (in paying rent, &c., to the landlord) which may induce the latter to believe that the relation of landlord and tenant exists between them (*k*).

A tenant who pays rent to (or otherwise recognises the title of) one who claims to be assignee of the reversion is not estopped from denying his title in the same way as he is estopped from denying the title of the lessor by whom he has been let into possession (*l*). Receipt of rent, for instance, is *primâ facie* evidence of the title as assignee of the reversion of the person to whom it is paid; but evidence is always admissible on the part of the tenant to explain the payment (*m*), by showing, if he can, that there is a third

(*z*) As to recognition obtained by fraud, see *infra*, p. 472.

(*a*) *Cornish v. Searrell*, 8 B. & C. 471; *Gregory v. Doidge*, 3 Bing. 474.

(*b*) *Gravenor v. Woodhouse*, 1 Bing. 38; *Cooper v. Lands*, 14 W. R. 610.

(*c*) *Doe v. Brown*, 7 A. & E. 447.

(*d*) *Cooke v. Lozley*, 5 T. R. 4; *Doe v. Francis*, 2 Moo. & R. 57; *Rogers v. Pitcher*, 6 Taunt. 202; *Fenner v. Duplock*, 2 Bing. 10; *Doe v. Wiggins*, 4 Q. B. 367; *Doe v. Clarke*, Peake, Add. Ca. 239.

(*e*) *Doe v. Wilkinson*, 3 B. & C. 413.

(*f*) *Panton v. Jones*, 3 Camp. 372; *Doe v. Mitchell*, 1 B. & B. 11; *Cooper v.*

Blandy, 1 Bing. N. C. 45; *Knight v. Cox*, 18 C. B. 645 (reported as *Cox v. Knight*, 25 L. J. C. P. 314).

(*g*) *Hitchings v. Thompson*, 5 Exch. 50. Cf. *supra*, at note (*y*), p. 467.

(*h*) No vesting order had been obtained in the bankruptcy: see *ante*, p. 458.

(*i*) *Jump v. Payne*, 68 L. J. Q. B. 607.

(*k*) See *Serjeant v. Nash*, [1903] 2 K. B. 304.

(*l*) *Carlton v. Boucock*, 51 L. T. 659, per Cave, J.

(*m*) *Doe v. Francis*, 2 Moo. & R. 57, per Patteson, J.

person who is in fact assignee of the reversion, and that he either paid the rent by mistake or in ignorance of the facts relating to the title (*n*), or that the person to whom he paid it received it as agent or collector for such third person (*o*). And where the act of recognition relied upon is obtained by misrepresentation or fraud (*p*), or even under circumstances merely suspicious (*e.g.*, where a long time has been allowed to elapse without its having been in any way acted upon (*q*)), no estoppel will arise.

For example, a tenant may show that he paid the rent, &c., in ignorance of some defect in the title of the person to whom he paid it (*r*): such as that his liability to his original lessor not having been extinguished, the latter and not the person to whom he paid the rent was entitled to receive it (*s*), or that the reversion was really in another person at the time it was paid (*t*). Nor does it make any difference that the payment was made with notice of an adverse claim by such third person, unless made with full knowledge of the nature of the title of the person to whom it was made (*u*). And after the person to whom it was made has determined the tenancy, the tenant, although he continue to hold, is not estopped from showing that the tenancy was entered into by a mistake, and that he was himself entitled under a lease from another person (*x*).

But the tenant will in no case be allowed to impeach the title of a person to whom he has paid rent, &c., without showing a better title in some other person (*y*). Thus he cannot, after attorning to a person who derives his title under a will, contend merely that upon a true construction of the will he had no title (*z*); nor can he after paying him rent dispute his title on the mere ground that the devise to him was void, owing to the incapacity of the testator (*a*). A tenant, too, of glebe lands cannot, after paying rent to a successor of the incumbent from whom he received possession, dispute the title of such successor on the mere ground that his presentation to the benefice was invalid (*b*). So a lessee who had

(*n*) *Per Cave, J., ubi sup.*

(*o*) *Jones v. Stone*, [1894] A. C. 122.

(*p*) *Doe v. Brown*, 7 A. & E. 447; *per Cave, J., ubi sup.*

(*q*) *Gravenor v. Woodhouse*, 1 Bing. 38.

(*r*) *Gregory v. Doidge*, 3 Bing. 474.

(*s*) *Cornish v. Searrell*, 8 B. & C. 471.

(*t*) *Rogers v. Pitcher*, 6 Taunt. 202; *Knight v. Coz* (or *Coz v. Knight*), *supra*.

(*u*) *Fenner v. Duplock*, 2 Bing. 10 (in which case the payment was made to the person from whom the possession was actually received, but after his title had

expired; cf. *supra*, pp. 469, 470); *Serjeant v. Nash*, [1905] 2 K. B. 304.

(*z*) *Accidental Death Insurance Co. v. Mackenzie*, 5 L. T. 20. Cf. p. 467, *supra*.

(*y*) *Carlton v. Boucock*, 51 L. T. 659, *per Cave, J.*; *Cooper v. Blandy*, 1 Bing. N. C. 45, *per Tindal, C. J.*

(*x*) See *Gravenor v. Woodhouse*, 2 Bing. at p. 71.

(*a*) *Doe v. Wiggins*, 4 Q. B. 367.

(*b*) *Cooke v. Loxley*, 5 T. R. 4.

occupied under two tenants in common, and who, upon the latter agreeing on a partition, had paid his whole rent to one of them, was not permitted afterwards to defend an ejectment by him, on the mere ground that the partition deed had not been executed (*c*).

This branch of the estoppel, like the former, extends to parties entering under persons who, by paying rent or otherwise recognising title, have raised it against themselves (*d*). And, like the former, it will not prevent the tenant from showing that the title of the person to whom he paid rent or attorned has expired (*e*). Nor will it prevent him from denying that he became tenant on the footing of accepting all the liabilities of the lease (*f*).

Moreover, the principle only applies where the payment of rent is made by a party who is in the position of tenant. Thus, where a company who were assignees of a lease had issued debentures, and a person who had been appointed by the Court in a debenture-holders' action receiver and manager of the company's business, in response to an application from the landlord to the company, paid out of funds in hand a half-year's rent in his capacity as such receiver, it was held that he was not estopped, in an action for subsequently accruing rent, from denying altogether that he was tenant to the plaintiff (*g*).

Next, as to *tenancies by estoppel*.

Estoppels must be reciprocal (*h*); and the landlord just as much as the tenant is estopped from denying his title at the time he made the demise (*i*), and consequently from setting up while his reversion lasts during the demise—but not afterwards, even though he may acquire a new reversionary interest after the term (*k*)—any relation between himself and the lessee other than that of landlord and tenant (*l*). This holds equally whether the letting be by deed (*m*) or not (*n*), and whether such landlord actually let the tenant into possession (*n*), or, as assignee of the reversion, received rent from him afterwards (*o*); but inasmuch as in those cases where the letting is by deed all persons, whether claiming under the deed

(*c*) *Doe v. Mitchell*, 1 B. & B. 11.

(*d*) *Cooper v. Blandy*, 1 Bing. N. C. 45.

(*e*) *Brook v. Biggs*, 2 Bing. N. C. 572;
Serjeant v. Nash, *supra*.

(*f*) *Tichborne v. Weir*, 67 L. T. 735,
per Bowen and Kay, L. J.J.

(*g*) *Justice v. James*, 15 T. L. R. 181.

(*h*) Co. Lit. 352 a.

(*i*) *Cole*, Ejec. 220. Cf. *Keith v.*

Ganoia, [1904] 1 Ch. 774, at p. 790, per
Vaughan Williams, L. J.

(*k*) *Weller v. Spiers*, 26 L. T. 866.

(*l*) *Id.*, per Cockburn, C. J.

(*m*) *Green v. James*, 6 M. & W. 656,
per Alderson, B.

(*n*) See *Darlington v. Pritchard*, 4 M.
& Gr. 783.

(*o*) *Weller v. Spiers*, *supra*.

or not (*p*), are equally bound by the estoppel (*q*), the operation of the principle may be then properly said to create an *estate or tenancy by estoppel*. For if the lessor, demising by deed, and possessing himself no interest (or only a contingent interest (*r*)) in the premises, subsequently acquire sufficient to support the demise, the estoppel is said to be "fed," and the estate by estoppel becomes a valid and binding estate in interest (*s*), which has relation back by force of the estoppel to the date of the demise (*t*).

The estate by estoppel, which is *prima facie* an estate by reversion in fee simple (*u*), and an estate capable of assignment (*x*), runs, so far as covenants are concerned, with the land (*y*): *i.e.*, such covenants are binding, upon the subsequent acquisition of the interest, not only on the parties to the deed, but on all persons claiming through them (*z*), who are consequently in the same position as if the estate had been *ab initio* an estate in interest (*a*). Nor does it arise the less because it may appear upon the face of the deed itself that the lessor, at the time he purported to demise, had no estate or interest in the premises (*b*).

In order to create an estate by estoppel no interest must be capable of passing from the lessor in the first instance (*c*). If any interest, however small, pass from him (*e.g.*, if he demise for twenty-one years, possessing a term of five years in the premises), no estate by estoppel can arise (*d*). It will be observed that inasmuch as a demise of this character amounts in law to an assignment (*e*), neither is the lessee in such a case estopped from disputing the lessor's title, *i.e.*, from saying that he himself is not a lessee at all (*f*); so that the requirement that estoppels should be reciprocal is here also satisfied.

(*p*) *Doe v. Oliver*, 10 B. & C. 181; 2 Sm. L. C. 724.

(*q*) *I.e.*, upon the acquisition of an interest, as explained *infra*. See *Doe v. Ongley*, 10 C. B. 25.

(*r*) *Doe v. Oliver*, *supra*.

(*s*) Co. Lit. 47 b; *Doe v. Oliver*, *supra*; *Webb v. Austin*, 7 M. & Gr. 701.

(*t*) Notes to *Spencer's case*, 1 Sm. L. C. at p. 97 (11th ed.).

(*u*) *Sturgeon v. Wingfield*, 15 M. & W. 224.

(*x*) *Cuthbertson v. Irving*, 6 H. & N. 135; *ante*, p. 437.

(*y*) Notes to *Spencer's case*, 1 Sm. L. C. 95 *et seq.* (*Whitton v. Peacock*, 2 Bing. N. C. 411, *semb. cont.*). See *ante*, p. 417.

(*z*) Co. Lit. 352 a; *Trevivan v. Lawrence*, 1 Salk. 276; 2 Sm. L. C. 742.

(*a*) 1 Sm. L. C. at p. 97.

(*b*) 1 Sm. L. C. 98, notes to *Spencer's case*, citing *Jolly v. Arbuthnot*, 4 De G. & J. 224; *Morton v. Woods*, L. R. 4 Q. B. 293 (*Pargeter v. Harris*, 7 Q. B. 708, *semb. cont.*).

(*c*) Cp. *supra*, p. 469.

(*d*) *Treport's case*, 6 Co. 14 b; *Bac. Ab. Leases* (O); *Doe v. Seaton*, 2 C. M. & R. at p. 730, per Parke, B.; notes to *Walton v. Waterhouse*, 2 Wms. Saund. 826 (ed. 1871).

(*e*) *Ante*, p. 413.

(*f*) *Langford v. Selmes*, 3 K. & J. 220. (There is, however, apparently a *dictum* to the contrary by Jessel, M. R., in *In re Stringer's Estate*, 6 Ch. Div. at p. 9. The decision, as will be seen, was reversed by the C. A.)

Part I.

CREATION OF THE RELATIONSHIP
(continued).

Book II.

INCIDENTS OF CREATION.

[DISTRESS.]

IN addition to the various rights and duties already discussed, which are conferred and imposed upon parties who stand in the relation of landlord and tenant, one incident of that relationship (and one almost entirely peculiar to it) is of so anomalous a character as to require special and separate consideration. Reference of course is here made to the landlord's right of distress.

CHAPTER I.

DISTRESS—NATURE AND CONDITIONS
PRECEDENT.

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Nature of the right.—It has already been mentioned (a) that if rent reserved upon a demise be in arrear the person legally entitled to it may distrain for it. That is to say, he may, without previous legal process of any kind, and without even a previous demand of the rent (b) (for the distress itself operates as a demand (c)), seize upon goods or cattle, whether the property of the tenant or not, which he may find on the demised premises; and, after selling them, satisfy his claim for rent out of the proceeds. It is a remedy given by the common law "without any particular reservation or provision of the party" (d); though, as will be explained hereafter, at common law the goods were only a pledge in the distrainor's hands, the right of sale being introduced afterwards by statute (e). But it may always be controlled by arrangement of the parties; thus, for instance, it may be postponed for a fixed period after the rent becomes due, or until a certain condition has been fulfilled (f), and the landlord may deprive himself of the right by agreement,

(a) *Ante*, p. 114.(b) *Gillingham v. Guyer*, 16 L. T. 640, per Lush, J.(c) *Mallam v. Arden*, 10 Bing. 299, per Alderson, B.

(d) Co. Lit. 142 a.

(e) Bullen, *Distress*, 12 (2nd ed.). See *post*, pp. 545 *et seq.*(f) *Giles v. Spencer*, 3 C. B. N. S. 244.

—either generally (*g*), or in regard to specified objects (*h*)—or even by conduct (*i*). So too he may, while the demise is running, undertake for good consideration not to distrain for a specified time (*k*).

The full right of distress, however, given by law is not lost or curtailed unless it clearly appear that such was the intention of the parties. Hence if, for instance, the indulgence stipulated for is only conditional on some act of the tenant, the condition must be strictly performed by the latter (*l*). So a mere course of dealing between the parties, by which payment of the rent is allowed to be deferred for a certain period after it becomes due, will not prevent a distress before that period has expired (*m*). And a special power (in *affirmative* words) contained in the lease, to distrain for rent after the lapse of a certain time from its being due, does not oust the general right to distrain immediately (*n*); nor (as it has been held) does it make any difference that the power of distress so given by the lease is, in some respects, larger (*e.g.*, by extending to privileged goods (*o*)) than that given by the common law (*p*).

It would seem clear that a power of distress given by mere contract could not be available against the goods of strangers (*q*).

Conditions precedent to its exercise.—To make a distress for rent lawful the following conditions must be fulfilled. (But an *express* power to distrain can be given by agreement even where this is not the case (*r*).)

- (1) There must be a demise express or implied.
- (2) The demise must be subsisting at the time the rent for which the distress is made falls due.
- (3) The demise must be one of real and corporeal hereditaments.
- (4) It must reserve a specific rent.
- (5) The rent must be payable at a time certain.

(*g*) See *Welsh v. Rose*, 6 Bing. 638.

(*h*) Such an arrangement is not uncommon in reference to things brought on to the premises by third persons: see, *e.g.*, *Gough v. Wood*, [1894] 1 Q. B. 713.

(*i*) *Horsford v. Webster*, 1 C. M. & R. 696; *Miles v. Furber*, L. R. 8 Q. B. 77; *Fowkes v. Joyce*, 2 Vern. 129; *Pape v. Westacott*, [1894] 1 Q. B. 272.

(*k*) See *Oxenham v. Collins*, 2 F. & F. 172.

(*l*) *Welsh v. Rose*, *supra*.

(*m*) See *Ex parte Bull*, 18 Q. B. D. 642, cited *post*, p. 523.

(*n*) Co. Lit. 205 a.

(*o*) See *post*, pp. 494 *et seq.*

(*p*) *In re River Swale Brick Works*, 52 L. J. Ch. 638.

(*q*) See *Daniel v. Stepney*, L. R. 9 Ex. 185 (cited *post*, p. 517), where the point was not decided.

(*r*) See, *e.g.*, *Chapman v. Beecham*, 3 Q. B. 723; *Pollitt v. Forrest*, 11 Q. B. 949; *Williams v. Hayward*, 1 E. & E. 1040.

- (6) The demise must reserve a reversion to the distrainer, and such reversion must be vested in him at the time of distress.

Moreover, when the creation of the tenancy is itself subject to a condition, the right of distress cannot be exercised until notice of the lessor's intention to avail himself of its fulfilment has been given to the lessee. Thus where a mortgage deed provided that the mortgagor, in the event of default, should immediately or at any time thereafter hold the premises as yearly tenant to the mortgagees from the date of the deed at a rent recoverable by distress, it was held that notice of an intention to treat the mortgagor as tenant was a condition precedent to the right of distress (s).

Where, as sometimes happens, the lessee undertakes to purchase certain articles he requires in his business from his lessor—*e.g.*, beer, &c., in leases of public-houses from brewers—it is not uncommon to find a clause by which it is stipulated that their price may be recovered like rent by distress (t). Such a stipulation, however, is a "licence to take possession of personal chattels as security for a debt" (u), and therefore sums due under it cannot be distrained for unless the instrument be registered as a bill of sale (x).

But as the object of the Bills of Sale Acts is, not to interfere with the law of real property, but to prevent secret pledges of chattels for money lent (y), the ordinary power of distress for rent incident to every lease is not within the scope of the above words (z); though the result might be different if the power were expressly framed in such wide terms (*e.g.*, over property entirely unconnected with the demise) as to justify the inference that it was being used as a cloak for a transaction really falling within those Acts (y). Nor (as it seems) is the landlord's ordinary power of distress conferred by a lease "deemed to be a bill of sale" (a), as being one "given or agreed to be given . . . by way of security for any . . . debt" (z); for this provision, which was intended to defeat the schemes of lenders of money who had resort to forms embracing ostensibly the relation of landlords and tenants for the purpose of

(s) *Clowes v. Hughes*, L. R. 5 Ex. 160.

(t) *Iredale v. Kendall*, 40 L. T. 362. See, as to this undertaking, p. 248, *ante*.

(u) Within 41 & 42 Vict. c. 31, s. 4.

(x) *Pulbrook v. Ashby*, 56 L. J. Q. B. 376; *Stevens v. Marston*, 60 L. J. Q. B. 192 (where it is pointed out that the

instrument of demise is not necessarily void altogether).

(y) Per Lindley, L. J., in next-cited case.

(z) *In re Roundwood Colliery Co.*, [1897] 1 Ch. 373.

(a) Within 41 & 42 Vict. c. 31, s. 6. Cf. *ante*, p. 464.

securing their advances, does not (as it appears) extend to the case of real *bonâ fide* leases with actual rents (*b*).

(1) *There must be a demise express or implied.*

In the case of an actual lease, whether for years (*c*) or at will (*d*), a distress may in general always be made. The demise, however, need not be express, for the mere acknowledgment by a person in possession of premises of tenancy to another (*e*) at a certain rent is sufficient to imply a demise which will support the right of distress (*f*). But in the case of a mere agreement for a lease no distress could (before the Judicature Acts) have been levied unless the relationship of landlord and tenant had arisen between the parties (*g*). This relationship, however, might arise in such a case (*a*) by express agreement between them that the right of distress should exist until the lease was granted (*h*); (*β*) by the agreement, although in appearance merely executory, operating in effect as a present demise (*i*); (*γ*) by payment (*k*) (or acknowledgment in account (*l*)) of rent—or a clear admission of its being due (*m*),—when a tenancy from year to year at common law arose immediately by implication (*n*).

Payment of rent, however, is no longer necessary, as if the agreement is one of which specific performance would be given (*o*), the mere taking of possession is now sufficient to support a distress (*p*). It follows that the only case in which an agreement for a lease will not permit of a distress is one where all the following circumstances concur:—no present demise, no title to specific performance, and no rent paid or agreed (at fixed periods and to a fixed amount) to be paid (*q*).

A mere licence, *i.e.*, an instrument which does not purport to

(*b*) Per A. L. Smith, L. J., in last-cited case. This point perhaps cannot be said to have been actually decided, the lease in question being a mining lease, which is expressly excepted from the scope of sect. 6.

(*c*) Co. Lit. 47 a.

(*d*) Co. Lit. 57 b.

(*e*) *E.g.*, by attornment: *Kearsley v. Philips*, 11 Q. B. Div. 621; *Daubus v. Lavington*, 13 Q. B. D. 347. See *post*, p. 525.

(*f*) *Yeoman v. Ellison*, L. R. 2 C. P. 681.

(*g*) *Dunk v. Hunter*, 5 B. & A. 322; *Heggin v. Johnson*, 2 Taunt. 148.

(*h*) *Bicknell v. Hood*, 5 M. & W. 104; *Anderson v. Mid. Ry. Co.*, 3 E. & E. 614; *Bennett v. Ireland*, E. B. & E. 326.

(*i*) *Warman v. Faithfull*, 5 B. & Ad. 1042; *ante*, p. 74.

(*k*) *Knight v. Bennett*, 3 Bing. 361; *Mann v. Lovejoy*, Ry. & M. 355.

(*l*) *Cox v. Bent*, 5 Bing. 185.

(*m*) *Vincent v. Godson*, 4 D. M. & G. 546, per Lord Cranworth, L. C.

(*n*) *Ante*, p. 343.

(*o*) *Ante*, p. 345.

(*p*) *Walsh v. Lonsdale*, 21 Ch. Div. 9; *ante*, p. 13.

(*q*) See *Anderson v. Mid. Ry. Co.*, *supra*.

convey the exclusive occupation of premises (*r*), will not support a distress (*s*). It is therefore submitted that, for the rent of *lodgings*, no distress can be levied in those cases where, as already pointed out (*t*), the agreement amounts only to a licence and not to a demise, *e.g.*, in the case where the lodger is furnished with attendance (*u*).

(2) *The demise must be actually subsisting at the time the rent for which the distress is levied falls due.*

(This condition, it may be observed, is distinct from the requirement which has sometimes but not always to be fulfilled (*x*), that the distress itself must be made during the continuance of the demise.) Thus a termor who has underlet cannot distrain for rent which has accrued after his own term (and consequently the underlease (*y*)) has expired (*z*). So where a tenant having been evicted by title paramount re-entered under a fresh agreement with the person who evicted him, it was held that the original lessor whose title was defeated before the rent became due could not recover such rent from the tenant by distress (*a*). For the same reason where a landlord upon a forfeiture having been incurred elects to determine the lease (*b*), he cannot subsequently distrain for rent accruing due after the commencement of the proceedings in ejectment (*c*); and the same thing then applies to a lessee who has created an underlease, inasmuch as on the determination by forfeiture of the head lease the underlease, as will be seen hereafter (*d*), is determined also (*e*). So, again, where a tenant holds over after the expiration of a notice to quit, the landlord cannot distrain for rent falling due after such expiration (*f*), unless there be evidence from which a renewal of the tenancy can be inferred (*g*).

(*r*) *Ante*, p. 7.

(*s*) *Ward v. Day*, 4 B. & S. 337, per Blackburn, J., at p. 358; *affd.*, 5 B. & S. 359; *Bentley v. Roman*, 9 T. L. R. 192.

(*t*) *Ante*, p. 8.

(*u*) In *Newman v. Anderton*, 2 N. R. 224, it does not appear that attendance was furnished by the landlord or that he had retained the control of the whole house; and the only point argued was as to the application of the third condition: *infra*, p. 481.

(*x*) *Post*, p. 513.

(*y*) See *ante*, p. 23.

(*z*) *Burns v. Richardson*, 4 Taunt. 720, cited also *infra*, p. 485.

(*a*) *Hopcraft v. Keys*, 9 Bing. 613.

(*b*) *Post*, p. 656.

(*c*) *Bridges v. Smyth*, 5 Bing. 410. Similarly, as to a distress under these circumstances for rent due *before* forfeiture: see *post*, p. 514.

(*d*) *Post*, p. 650.

(*e*) *Serjeant v. Nash*, [1903] 2 K. B. 304.

(*f*) *Alford v. Vickery*, Car. & M. 230. But as to distress for "double rent" which may then become due, see *post*, p. 762.

(*g*) *Jenner v. Clegg*, 1 Moo. & R. 213. As to a distress after the end of a tenancy for rent due before it, see *post*, p. 514.

Similarly, where the tenant has surrendered his lease, no distress can be levied for any rent alleged to have become due subsequently, as the rent has become extinct (*h*). But if the surrender be only made upon a condition which remains unfulfilled, a distress for subsequent rent will be valid (*i*).

A word may here be said as to the effect upon the right of distress of a contract by the tenant to purchase the reversion. At law, as will be pointed out hereafter (*k*), such a contract does not operate as a surrender; the condition now under discussion being consequently fulfilled, the right of distress exists. In equity, however, the result of such a contract is to suspend that right pending completion: a result which will if necessary be enforced by injunction (*l*). But the right to such injunction, being merely incidental to the right to obtain specific performance, will be lost if that right, whether by abandonment of the contract or by unreasonable delay in its completion, itself be lost; and in such case, the parties being left free to enforce their rights at law, a distress for rent will be valid (*m*). Nor does the fact that the contract contains a stipulation for payment of interest on the purchase-money in case of non-completion on the appointed day—even though such interest is precisely equal in yearly amount to the rent—afford an implication that the rent should cease to be payable, except in the event of completion (*l*).

(3) *The demise must be one of real and corporeal hereditaments.*

First, it must be a demise of real hereditaments, *i.e.*, of lands and tenements (*n*). Where, however, the demise is of land with stock thereon (*o*), or of a house or apartments with furniture therein (*p*), or of a room in a factory with steam power supplied (*q*), the rent is deemed to issue out of the realty alone, and such demises will therefore support a distress. In the next place, no distress can, as already stated (*r*), be made for rent (so-called) reserved upon a demise of incorporeal hereditaments, such as a mere privilege or easement (*s*), a right of common, or tithes, or the like (*t*). Where certain "standings" for machines in the

(*h*) Shep. Touch. 301.

(*i*) *Coupland v. Maynard*, 12 East, 134.

(*k*) *Post*, p. 636.

(*l*) Per Chitty, L. J., in next-cited case.

(*m*) *Ellis v. Wright*, 76 L. T. 522.

(*n*) Co. Lit. 47 a.

(*o*) *Spencer's case*, 5 Co. 16 a.

(*p*) *Newman v. Anderton*, 2 N. R. 224.

(*q*) *Marshall v. Schofield*, 52 L. J. Q. B. 58.

(*r*) *Ante*, p. 114.

(*s*) See *Capel v. Buszard*, 6 Bing. 150.

(*t*) Co. Lit. 47 a, 142 a.

rooms of a lace factory were purported to be let for a weekly sum, the lessor supplying the necessary working power for the machines, it was held that this did not amount to a demise, and that the payment was only for a privilege or easement, and could not, therefore, be distrained for (*u*). But if the letting be of a defined portion of the room this will be otherwise (*x*). And where corporeal and incorporeal hereditaments were let together at a single rent, by an instrument which was void as to the latter for not being under seal (*y*), it was held that a distress put in upon the premises for rent in arrear was altogether unlawful (*z*).

(4) *The demise must reserve a specific rent.*

First, it must be strictly a rent: the reservation of an annual payment, even if made as rent, will not of itself suffice (*a*). Thus, a mere sum reserved annually over and above a rent by way of compensation for a goodwill (*b*), or a sum agreed during the currency of a term to be paid annually over and above the rent for improvements made on the premises by the landlord (*c*) (even though expressly referred to as rent (*d*)), are in reality sums in gross and not rent, and will not support a distress. Next, the rent, though not necessarily of money, as a render of manual services may be sufficient for a distress (*e*), must be specific (*f*), *i.e.*, either fixed or capable of being definitely ascertained (*g*); but the mere fact of its being fluctuating in amount will not invalidate a distress (*h*). Thus where, for instance, the amount of rent in the demise of a mill depends on the number of looms "run" (*i*), or in that of a marl pit and brick mine on the quantity of marl got and bricks made (*k*), it is sufficiently ascertainable, and is, therefore, recoverable by distress.

So where an increased or additional rent (*l*) is by the terms of a lease to be paid upon the tenant's doing certain acts, as converting meadow into tillage (*m*), or removing produce from the

(*u*) *Hancock v. Austin*, 14 C. B. N. S. 634.

(*x*) *Selby v. Greaves*, L. R. 3 C. P. 594; *Marshall v. Schofield*, *supra*.

(*y*) *Ante*, p. 18.

(*z*) *Gardiner v. Williamson*, 2 B. & Ad. 336.

(*a*) See this point discussed *ante*, p. 114.

(*b*) *Smith v. Mapleback*, 1 T. R. 441.

(*c*) See *Hoby v. Roebuck*, 7 Taunt. 157.

(*d*) See *Donellan v. Read*, 3 B. & Ad. 899.

(*e*) *Doe v. Benham*, 7 Q. B. 976.

(*f*) See *ante*, p. 115.

(*g*) Co. Lit. 96 a. See *Roskrige v. Cuddy*, 7 Exch. 840.

(*h*) *Ex parte Voisey*, 21 Ch. Div. 442.

(*i*) *Walsh v. Lonsdale*, 21 Ch. Div. 9; see note (*q*), p. 13, *ante*. Only the minimum rent was allowed to be distrained for, as the rent was payable in advance.

(*k*) *Daniel v. Gracie*, 6 Q. B. 145.

(*l*) See pp. 154—157, *ante*.

(*m*) *Roulston v. Clarke*, 2 H. Bl. 563.

premises (*n*) (the amount of such rent to depend on the quantity of meadow so converted, or produce so removed), a distress may be made to recover it. Nor if the rent be certain does it make any difference that it be apparently of a penal nature (*o*); though a previous demand of the rent, contrary to the general rule (*p*), is necessary in such cases (*q*). Thus, where upon the contract for the sale of a public-house for a sum of 1,575*l.*, it was agreed that the intending purchaser who was let into possession should, until completion, hold as tenant to the vendor at a rent of 80*l.* per week, it was held that a distress to recover such rent was valid (*r*). In the case, however, of holdings to which the Agricultural Holdings Act applies (*s*) it is now expressly provided that—except where breaking up pasture, or grubbing underwood, or cutting or injuring trees, or burning heather is concerned—penal rents shall not be distrained for as such, the landlord being no longer entitled to recover anything beyond the damage actually suffered by him in consequence of the breach or non-fulfilment of the tenant's covenant (*t*).

The requisite certainty may be supplied by the acts of the parties after the commencement of the tenancy. Where, for instance, an agreement for a lease failed to specify the amount of rent to be paid, but as a matter of fact a certain rent had been paid by the tenant for two years, the landlord was held entitled to distrain for subsequent rent, as a yearly tenancy could be implied at the rent which had been paid (*u*).

Where rent has in any case to be apportioned (*x*), the apportioned part may be distrained for (*y*); so that upon a severance of the reversion each reversioner, for his part only, may distrain (*z*).

(5) *The rent must be payable at a time certain.*

The question of the time generally when rent becomes payable has already been treated of (*a*). If made payable at a time certain,

(*n*) See *Pollitt v. Forrest*, 11 Q. B. 949. In this case, however, the extra amount to be paid was described by the lessor in pleading, not as additional rent, but as a "penalty," and was therefore held to be only recoverable by distress in virtue of a special stipulation in the lease to that effect. Cf. *ante*, p. 156.

(*o*) *Mallam v. Arden*, 10 Bing. 299.

(*p*) *Supra*, p. 476.

(*q*) Per Alderson, B., in last-cited case.

(*r*) *Yeoman v. Ellison*, L. R. 2 C. P. 681.

(*s*) See 46 & 47 Vict. c. 61, ss. 54, 61; *post*, pp. 728, 729.

(*t*) 63 & 64 Vict. c. 50, s. 6. The section is set out *ante*, p. 156.

(*u*) *Knight v. Bennett*, 3 Bing. 361; *Watson v. Waud*, 8 Exch. 335.

(*x*) See *ante*, p. 120.

(*y*) *Neale v. Mackenzie*, 1 M. & W. at p. 758, per Lord Denman, C. J.

(*z*) Bullen, Dist. 39, n. It would seem that the tenant's consent to the apportionment must have been obtained first: see *ante*, p. 126.

(*a*) *Ante*, p. 117.

it may even be distrained for upon default when made payable in advance, whether by agreement (*b*) or by custom (*c*). A rent payable quarterly on the usual quarter days "and always, if required, a quarter in advance" is, as has already been seen (*d*), a rent payable throughout in advance; and where payment has been demanded it may be distrained for immediately, even though such demand is made during the currency of a quarter (*e*). But where a yearly rent was by agreement made payable in advance if required by the landlord (there being no other provision as to the time or times of payment), and on the expiration of the first quarter he demanded a quarter's rent only, which was not paid, it was held that he could not thereupon distrain for the whole year's rent (*f*).

In the same way where rent was reserved quarterly "or half-quarterly if required," and the landlord received it quarterly for a twelvemonth, it was held that he could not without notice distrain for a half-quarter's rent (*g*). On the other hand, where it was stipulated that at the end of a term the last half-year's rent should be reserved and due at the commencement of such half-year "if the lessor should see cause to demand it," it was held that the lessor might see cause for such demand at any time during the last half-year, and might then distrain for it without having demanded it previously to the commencement of such half-year (*h*).

(6) *There must be a reversion in the distrainor at the time of distress.*

The person distraining must possess a reversion to which the rent distrained for is incident (*i*), and such reversion must be vested in him at the time the distress is made (*k*). (It would seem clear that the reversion must also have been vested in him at the time the rent distrained for fell due; so that upon an assignment of the reversion arrears already due cannot be distrained for (*l*).) It follows that there is no right of distress (as between the parties)

(*b*) *Lee v. Smith*, 9 Exch. 662; *Harri-son v. Barry*, 7 Price, 690; *Walsh v. Lonsdale*, 21 Ch. Div. 9.

(*c*) *Buckley v. Taylor*, 2 T. R. 600.

(*d*) *Ante*, p. 117.

(*e*) *London and Westminster Loan Co. v. L. & N. W. Ry. Co.*, [1893] 2 Q. B. 49.

(*f*) *Clarke v. Holford*, 2 C. & K. 540.

(*g*) *Mallam v. Arden*, 10 Bing. 299.

(*h*) *Witty v. Williams*, 10 L. T. 457.

(*i*) *Co. Lit.* 47 a; *Bullen, Dist.* 23; *Wade v. Marsh, Latch*, 211.

(*k*) *Brawley v. Wade*, M'Clel. 661; *Staveley v. Allcock*, 16 Q. B. 636; *Smith v. Torr*, 3 F. & F. 505; *Brown v. Metropolitan Counties, &c., Society*, 1 E. & E. 882.

(*l*) See *Bullen, Dist.* 203, n. (2nd ed.), citing *Brown v. Metropolitan Counties, &c., Society*, *supra*. (But for a statutory exception in the case of death, see p. 489, *post*.) That the assignee cannot sue in respect of such arrears, unless expressly assigned to him, see *ante*, p. 164.

upon an *assignment* (*m*). Nor when an assignor pays rent as surety for his assignee (*n*) is the right of distress a security or remedy to the benefit of which he becomes entitled, by reason of the statute (*o*) conferring certain rights upon sureties who have discharged the obligations of their principals (*p*).

The right to distrain, it may be pointed out, is a legal right, and depends on the possession of the legal reversion. Hence it seems clear that the fact that the lessor has entered into an agreement to assign his interest in the demised premises cannot either disentitle him, or entitle the intending assignee, to distrain for rent which accrues due before the assignment is executed (*q*). But the existence of the legal reversion may be sufficiently established for the purpose of the above rule by estoppel (*r*): *e.g.*, in the case of attornment by a mortgagor to a mortgagee in a deed itself showing the legal reversion in a third party (*s*).

If a lessee underlet, he may distrain upon his underlessee for rent which accrues while his reversion lasts, though not after (*t*); but if he underlet for the whole term, so that he parts with his reversion (*u*), no right of distress remains to him, whether the underlease be by deed (*x*) or not (*y*), unless the right be expressly reserved to him by such instrument (*z*). Hence a lessee with an existing lease and a further reversionary lease or agreement, who underlets for a term exceeding the former, cannot during the currency of the existing lease distrain upon his undertenant for any rent owing from him (*a*). Nor does it make any difference to the general rule if it be specially stipulated that the underlessee is to be tenant to the lessee during the term (*b*), or if money have been paid or agreed to be paid by him *as rent* (*c*).

By granting a second lease to take effect upon the expiration of an existing lease for years the lessor (being owner in fee) does not

(*m*) Cases cited *infra*, notes (*x*), (*y*), and (*c*).

(*n*) See pp. 428, 429, *ante*.

(*o*) 19 & 20 Vict. c. 97, s. 5.

(*p*) *In re Russell*, 29 Ch. Div. 254.

(*q*) See per Farwell, J., in *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608.

(*r*) *Ante*, p. 473.

(*s*) *Morton v. Woods*, L. R. 4 Q. B. 293.

(*t*) *Burne v. Richardson*, 4 Taunt. 720.

(*u*) Cf. pp. 412, 413, *ante*.

(*x*) *Anon. v. Cooper*, 2 Wils. 375; *Pascoe v. Pascoe*, 3 Bing. N. C. 898.

(*y*) *Parmenter v. Webber*, 8 Taunt. 593; *Preece v. Corrie*, 5 Bing. 24. But as to underleases by a tenant from year to year, see *ante*, p. 37.

(*z*) Bac. Ab. Distress (A.). See *Pascoe v. Pascoe*, *supra*; *Williams v. Hayward*, 1 E. & E. 1040; *Jolly v. Arbuthnot*, 3 De G. & J. 224.

(*a*) *Lewis v. Baker*, [1905] 1 Ch. 46.

(*b*) *Parmenter v. Webber*, *supra*.

(*c*) *Hazeldine v. Heaton*, C. & E. 40, Stephen, J.

part with his reversion, so as to disentitle himself to distrain upon the existing tenant (*d*).

Where a termor who has sub-let surrenders his own lease (so that his reversion at common law is gone), his right of distress against his sub-tenant is, where such surrender is made for the purpose of obtaining a renewal of his lease, and such new lease is accordingly obtained, preserved to him by statute (*e*).

(*d*) *Smith v. Day*, 2 M. & W. 684.
See p. 20, *ante*.

(*e*) 4 Geo. 2, c. 28, s. 6, and 8 & 9
Vict. c. 106, s. 9. See *post*, p. 643.

CHAPTER II.

DISTRESS—BY AND AGAINST WHOM.

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By whom.—In accordance with what has been mentioned in the last chapter, any person possessing a reversion to which rent is incident is in general entitled to distrain. If the lessor, for instance, has assigned his reversion, the assignee (subject to the conditions already stated) may distrain for any rent which may be due.

Mortgagees.—It has already been pointed out in what cases (apart from the Conveyancing Act) and to what extent mortgagees are entitled to payment of the rent under leases granted by their mortgagors, both before (*a*) and after (*b*) the mortgage; and whenever they are so entitled they may enforce payment by distress (*c*).

Between the mortgagee and mortgagor themselves the relation may (by virtue, *e.g.*, of an attornment clause in the mortgage deed (*d*), or by simple agreement to that effect (*e*)) be that of landlord and tenant; and when this is the case (*f*) the right of distress

(*a*) *Ante*, pp. 165, 405.

(*b*) *Ante*, p. 59.

(*c*) *Carter v. Salmon*, 43 L. T. 490.

(*d*) *Ante*, p. 463.

(*e*) *Pinhorn v. Souster*, 8 Exch. 763.

(*f*) *Clowes v. Hughes*, L. R. 5 Ex. 160, is distinguishable on the ground explained *ante*, p. 478.

attaches (*g*) while the tenancy lasts (*h*), and can be exercised against all persons holding under the mortgagor (*i*), provided the real effect of the deed be to create that relation (*k*). Where, however, the tenancy created by the attornment clause, being determinable at the will of the lessor and not being for a fixed term, is only a tenancy at will (*l*), it will determine, in accordance with established rule (*m*), by the death of the mortgagor; and the mere fact of payments of interest having been made by his successor to the amount and in the mode prescribed by that clause will not justify a distress against him, at all events when the receipts given for such payments by the mortgagees have been expressed to be not for rent but for interest (*n*).

The foregoing observations must now be regarded as subject to what has been already said as to the Bills of Sale Acts (*o*).

Mortgagors.—Where a person having made a lease mortgages his interest in the premises demised, he loses his right of distress, as his privity of estate with the tenant is thereby destroyed (*p*); but if permitted to continue in receipt of the rents and profits, he may authorize a distress as agent of the mortgagee (*q*). And an assignee of the equity of redemption is also entitled to distrain, where on paying off the mortgage he obtains from the mortgagee an authority to receive the rents, and an undertaking to execute a conveyance when required (*r*).

On the other hand, where a mortgagor demises premises which are already in mortgage he may distrain on his own account (*s*); though, as between himself and the mortgagee, he may be restrained from doing so if payment of the mortgage money or interest be in arrear (*t*). And where a receiver was appointed under the Conveyancing Act (*u*) by a mortgagee, it was held that only he or some one with his authority could distrain, and that a distress by the mortgagor, though for rent due before the appoint-

(*g*) *West v. Fritche*, 3 Exch. 216; *Morton v. Woods*, L. R. 4 Q. B. 293. (In both these cases the deed was unexecuted by the mortgagee, but there had been occupation under it by the mortgagor.)

(*h*) *Brown v. Metropolitan Counties, &c., Society*, 1 E. & E. 832.

(*i*) *Kearsley v. Philips*, 11 Q. B. Div. 621.

(*k*) *Gibbs v. Cruikshank*, 28 L. T. 104.

(*l*) *Ante*, p. 2.

(*m*) *Post*, p. 597.

(*n*) *Scobie v. Collins*, [1895] 1 Q. B. 375.

(*o*) *Ante*, p. 464.

(*p*) Bullen, Dist. 81 (2nd ed.).

(*q*) *Trent v. Hunt*, 9 Exch. 14; *Reece v. Strousberg*, 54 L. T. 133.

(*r*) *Snell v. Finch*, 13 C. B. N. S. 651.

(*s*) *Alchorne v. Gomme*, 2 Bing. 54, and 44 & 45 Vict. c. 41, s. 18; *ante*, p. 59.

(*t*) *Bayly v. Went*, 51 L. T. 764.

(*u*) 44 & 45 Vict. c. 41, s. 24.

ment of the receiver, unauthorized (but not actually forbidden) by the latter, was consequently illegal, though the statute in terms provides that the receiver is to be deemed the agent of the mortgagor (*x*).

Executors and administrators.—The personal representatives of any lessor who has demised for years or at will are empowered by statute to distrain for arrears of rent which have accrued during his life, both during the term (*y*) and after its determination (*z*), provided, in the latter case, the distress be made within six calendar months from such determination, and during the continuance of the possession of the tenant from whom the arrears became due. They may also, as assignees of the reversion, distrain for all rent of leaseholds accruing after the lessor's death (*a*). Executors may distrain before obtaining probate (*b*). In the case of a landlord of *freeholds* dying after the year 1897, the personal representative, in accordance with the provisions of the Land Transfer Act (*c*), would now—in lieu, as formerly, of the heir (*d*)—be entitled to distrain (*e*). In the case of intestacy it would seem, consistently with what has been already said, that until administration has been granted the proper party to distrain is the heir at law (*f*).

Joint tenants and tenants in common.—Joint tenants join together to distrain, as they hold by one title (*g*). But a distress by one—who may appoint a bailiff for the purpose—on behalf of the others is good (*h*), so long as none of the others expressly dissent (*i*). But where any of the joint tenants sever, the right of the others to distrain for rent which has already accrued is gone (*k*). A demise by one joint tenant to another, like any other demise, carries with it the right to distrain (*l*). Like joint tenants, parceners, who are considered in law but as one heir (*m*), join in making a distress (*n*), though, as in the case of joint tenants, one

(*x*) *Woolston v. Ross*, [1900] 1 Ch. 788.

(*y*) 3 & 4 Will. 4, c. 42, s. 37.

(*z*) *Id.*, s. 38.

(*a*) Bullen, Dist. 64.

(*b*) *Whitehead v. Taylor*, 10 A. & E. 210. See *ante*, p. 57.

(*c*) 60 & 61 Vict. c. 65, s. 1.

(*d*) Bullen, Dist. 65 (2nd ed.).

(*e*) As regards legatees and devisees, their right to distrain in the case of both leaseholds and freeholds now depends on the assent of the executor. See *ante*, p. 442; Bullen, 74.

(*f*) See *ante*, p. 57.

(*g*) Bullen, Dist. 49.

(*h*) *Pullen v. Palmer*, 3 Salk. 207.

(*i*) *Robinson v. Hofman*, 4 Bing. 562.

(*k*) *Staveley v. Allcock*, 16 Q. B. 636.

(*l*) *Cowper v. Fletcher*, 6 B. & S. 464. In this case the joint tenants were co-executors.

(*m*) Co. Lit. 163 b.

(*n*) Bullen, Dist. 47; *Stedman v. Bates*, 1 Salk. 390.

of them may distrain on behalf of the others, and that without their express authority (o). Tenants in common, however, who hold by different titles and have several estates, are entitled to distrain severally, each for his respective share of the rent (p), though one alone cannot distrain for more than his own share (q); but if the shares of all are in arrear there seems to be no objection to their joining in a distress for the whole (q). One of two tenants in common who have demised their property may distrain upon the lessee for his share of the rent, if the latter pay the whole to the co-tenant after notice not to do so (r). Where one tenant in common demises his share to another, he may distrain for the rent reserved (s).

Married women.—Women married after the commencement (t) of the Married Women's Property Act, 1882 (u), in respect of all their property, and women married before that date in respect of property their title to which has accrued since that date, may now distrain for rent in their own names; but the right of distress under leases made by women married before 1883 in respect of property they have acquired before that date is still regulated by the common law. At common law a married woman can in no case herself distrain (x), but her husband may do so during her life, whether her interest be leasehold or freehold (y); and after her death the common law still entitles him to distrain for arrears which have accrued during her life in the former case (z). For rent, too, which accrues after her death he may distrain in the former case (since the chattel interest then vests in him absolutely (a)), whilst he cannot in the latter (b), unless from the terms of the letting the tenant is estopped from disputing his title (c), or unless he become tenant by the curtesy (c); in which case he may always distrain as of common right (d).

Guardians, who may make leases on behalf of their wards during their minority (e), may distrain for the rent in their own names (f).

(o) *Leigh v. Shepherd*, 2 B. & B. 465.
(p) *Whitley v. Roberts*, M'Cl. & Y.

107.

(q) Bullen, Dist. 50.
(r) *Harrison v. Barnby*, 5 T. R. 246.
(s) *Snelgar v. Henston*, Cro. Jac. 611;
Bullen, Dist. 49.

(t) Jan. 1st, 1883.
(u) 45 & 46 Vict. c. 75.
(x) Bullen, Dist. 58.

(y) *Id.*, 57, 58.

(z) *Id.*, 57.

(a) *Ante*, p. 43.

(b) Subject now to the Land Transfer Act (60 & 61 Vict. c. 65), s. 1; see *supra*, p. 489.

(c) *Howe v. Scarrott*, 4 H. & N. 723.

(d) Bullen, Dist. 53.

(e) *Ante*, p. 41.

(f) Bullen, Dist. 77.

The *lord of a manor* may of common right distrain for rent upon his copyholder (*g*), or on any one claiming under him (*h*).

A *tenant by elegit* has a right to distrain, without attornment to him by the lessee being necessary (*i*).

Parish officers demising parish property, as previously explained (*k*), may distrain for the rent, it being competent for any one of them to authorize the distress (*l*).

Receivers appointed by the High Court may distrain without obtaining any special order for the purpose (*m*), and may appoint a bailiff to do so on their behalf (*n*); but if there be any doubt as to who is entitled to the rent as owner of the legal estate, the receiver should apply for such an order (*o*). As a general rule he should distrain in the name of the person in whom the right to distrain exists (*p*). If, however, the tenant has attorned to him (*q*), or if the demise has been made by the receiver, so that, as already explained (*r*), the tenant will be estopped from disputing his title as landlord (*s*), he should distrain in his own name; nor will such attornment operate to create a tenancy under the person who has the legal estate so as to entitle him to distrain himself (*t*). Where an occupier of lands refuses to attorn tenant to a receiver appointed by the County Court under the provisions of the Tithe Act, 1891 (*u*), and it becomes necessary to enforce the payment of rent in arrear, the receiver is required to apply to the Court for an order authorizing him to distrain in the name of the owner of the lands (*x*).

A private receiver, on the other hand, is not entitled to distrain without express authority in that behalf (*y*); even an authority given to tenants to pay rent to a person who is to receive it for his own benefit, and whose receipt is to be their discharge, does not empower such person to distrain (*z*). But where a receiver

(*g*) *Laughtler v. Humphrey*, Cro. Eliz. 524.

(*h*) Bullen, Dist. 59.

(*i*) *Lloyd v. Davies*, 2 Exch. 103. See p. 449, ante.

(*k*) *Ante*, p. 54.

(*l*) *Gouldsworth v. Knights*, 11 M. & W. 337.

(*m*) Bullen, Dist. 79.

(*n*) *Bennett v. Robins*, 5 C. & P. 379.

(*o*) *Pitt v. Snowden*, 3 Atk. 750; *Brandon v. Brandon*, 5 Madd. 473 (where the practice was said to be for the receiver

to distrain without an order only where not more than a year's rent is in arrear).

(*p*) *Justice v. James*, 15 T. L. R. 181, per Chitty, L. J.

(*q*) *Hughes v. Hughes*, 1 Ves. 161, per Lord Thurlow, L. C.

(*r*) *Ante*, p. 466.

(*s*) *Dawson v. Hastings*, 4 Bing. 2.

(*t*) *Evans v. Mathias*, 7 E. & B. 590.

(*u*) 54 Vict. c. 8; *ante*, pp. 63, 206.

(*x*) Tithe Rules, 1891, r. 20.

(*y*) Bullen, Dist. 79.

(*z*) *Ward v. Sheu*, 9 Bing. 608.

appointed under a mortgage was expressly empowered to receive the rents of the mortgaged property, and to distrain for them if necessary, and the mortgagor attorned to him, a distress by the receiver was held valid (*a*).

A receiver appointed by a mortgagee under the provisions of the Conveyancing Act is expressly empowered to recover rents by distress, in the name either of the mortgagor or of the mortgagee, to the full extent of the interest which the former could dispose of (*b*).

Agents.—Where a person distrains as agent (*c*), he should make the distress in the name of the person legally entitled to the rent (*d*); but if a person having authority to distrain for rent due to another says at the time that he distrains for rent due to himself, he may nevertheless afterwards justify as agent of the other (*e*).

Against whom.—A distress, as previously mentioned (*f*), may in general be levied against (*i.e.*, upon the goods of) any person, whether the tenant or not—even a mere disseisor (*g*)—of the demised premises (*h*). (The owner of the goods so distrained will, as against the tenant, be entitled to redeem them if lawfully on the premises (*i*), at the latter's expense, and in the event of their being sold to recover their value from him (*k*); and, as already stated (*l*), he is not estopped from disputing the landlord's right to demise.) So an assignee of part only of the premises may be distrained upon for the whole rent, as it issues out of every part (*m*).

As will be seen presently, however, there are two classes of *privileged persons* upon whose goods a distress cannot be levied: ambassadors and ministers (*n*), and lodgers, where the distress is made not for their own but for their landlords' rent, and where they have complied with the conditions prescribed by statute (*o*).

(*a*) *Jolly v. Arbuthnot*, 4 De G. & J. 224.

(*b*) 44 & 45 Vict. c. 41, s. 24. See *Woolston v. Ross*, [1900] 1 Ch. 788; cited *supra*, p. 489.

(*c*) If he actually distrain himself, he will now be subject to the provisions of 51 & 52 Vict. c. 21, s. 7; *post*, p. 531.

(*d*) *Bullen*, Dist. 78.

(*e*) *Trent v. Hunt*, 9 Exch. 14.

(*f*) *Ante*, p. 476.

(*g*) *Humphry v. Darnley*, Cro. Jac. 300.

(*h*) As to distress against the personal

representative of the tenant, see *post*, p. 514.

(*i*) See *Groom v. Bluck*, 2 M. & Gr. 567; cited p. 430, *ante*.

(*k*) See *Exall v. Partridge*, 8 T. R. 308; *Edmunds v. Wallingford*, 14 Q. B. Div. 811, per Lindley, L. J.

(*l*) *Ante*, p. 468.

(*m*) *Curtis v. Spitty*, 1 Bing. N. C. 756, per Tindal, C. J., cited *ante*, p. 114.

(*n*) *Post*, p. 506.

(*o*) 34 & 35 Vict. c. 79; *post*, pp. 506—510.

Nor is the remedy of distress one available against the Crown; so that Crown goods cannot be taken, either (as it would seem) where the Crown is tenant (*p*), or where such goods are found on the premises of a third party (*q*). And, in addition to these, the owners of goods which enjoy a privilege, whether absolute or qualified, from distress (*r*) are of course, *quoad* those goods, persons against whom a distress cannot be levied.

Where a demise is to *joint tenants* or *tenants in common*, a distress for the whole rent may *prima facie* be made against any one of them (*s*). But where the land is granted to tenants in common by separate demises but in undivided shares, no distress for rent owing by any one of them can be made except apparently as against him, *i.e.*, upon his own goods (*t*); and this even applies to exempt partners from having the partnership property distrained upon where rent is due under the above circumstances from each of them (*u*). So a distress cannot be levied against one tenant in common (or against a stranger whose goods are on the premises) by a co-tenant for rent in arrear upon a demise made by the latter to another person of his undivided share (*x*).

No distress can be levied against a *receiver* appointed by the Court without the leave of the Court (*y*); but this does not apply where the landlord is already in possession in the exercise of his right of distress at the time the receiver is appointed (*z*). Nor, as will be pointed out hereafter (*a*), can a distress be levied against a *company in liquidation* without such leave.

(*p*) See per Lord Alverstone, C. J., and Darling, J., in next-cited case.

(*q*) *Secretary of State for War v. Wynne*, [1905] 2 K. B. 845.

(*r*) See the next chapter.

(*s*) Bullen, Dist. 89, n.

(*t*) Per Bacon, C. J., in next-cited case. See also p. 517, *post*.

(*u*) *Ex parte Parke*, L. R. 18 Eq. 381.

(*x*) *Kempe v. Cory*, 2 Vent. 227, 283.

(*y*) *Re Sutton*, 32 L. J. Ch. 437, per Kindersley, V.-C.

(*z*) *Engel v. South Metropolitan Brewing Co.*, W. N. 1891, p. 31.

(*a*) *Post*, p. 527.

CHAPTER III.

DISTRESS—ON WHAT GOODS.

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As already mentioned, all goods found on the premises, whether the tenant's property or not, are in general available for distress. But property of an incorporeal nature (*a*), which can have no local position upon the land demised, is of course not within the above principle: so that although a patented chattel may not be in itself protected from liability to seizure, the right to prevent any dealing with it by a purchaser in contravention of the letters patent cannot be affected (*b*).

Certain classes of things, however, are privileged—some under all circumstances (*absolute privilege*), and others only so long as a sufficient distress can be found apart from them (*qualified privilege*).

The law relating to privilege may be exhibited in the subjoined table:—

(a) For example, the "eatage" of grass: *Horsford v. Webster*, 1 C. M. & R. 696.

(b) *British Mutoscope, &c., Co. v. Homer*, [1901] 1 Ch. 671.

I. Absolute.	A. By common law		1. Things affixed to the freehold. 2. Goods delivered to the tenant in the way of his trade. 3. Goods of a perishable nature. 4. Things in actual use. 5. Animals <i>feræ naturæ</i> . 6. Goods in custody of the law. 7. Money. 8. Straying cattle.
	B. By statute (c)		1. Wearing apparel, bedding, and tools to the value of 5 <i>l</i> . (51 & 52 Vict. c. 21, s. 4). 2. Agricultural machinery and breeding stock (46 & 47 Vict. c. 61, s. 45). 3. Motors, fittings, and machinery { (a) Gas (10 & 11 Vict. c. 15, s. 14, and 34 & 35 Vict. c. 41, s. 18). (b) Water (26 & 27 Vict. c. 93, s. 14, and 10 & 11 Vict. c. 17, s. 44). (c) Electric light (45 & 46 Vict. c. 56, s. 25). (d) Hydraulic power (private Acts). 4. Looms and apparatus of textile manufactures (6 & 7 Vict. c. 40, s. 18). 5. Railway rolling stock (35 & 36 Vict. c. 50, s. 3). 6. Crops and farming stock (56 Geo. 3, c. 50, s. 6). 7. Goods of ambassadors (7 Anne, c. 12, s. 3). 8. Goods of lodgers (34 & 35 Vict. c. 79, s. 2).

II. Qualified.	A. By common law		Tool and implements of trade.
	B. By statute (c)		1. Beasts of the plough and sheep (51 Hen. 3, stat. 4). 2. Growing crops sold under an execution (14 & 15 Vict. c. 25, s. 2). 3. Agisted live stock (46 & 47 Vict. c. 61, s. 45).

(c) Where the privilege is conferred by a statute, it must be understood to be subject always to the conditions and limitations therein laid down and hereinafter referred to.

I.—ABSOLUTE PRIVILEGE.

The following classes of goods are absolutely privileged:—

A. *By common law.*

1. *Things affixed to the freehold.*—Such things fall under one or more of the following heads:—

(a) Where they actually form part of the freehold (*d*).—Thus the anvil in a smith's shop (*e*), a limekiln (not being in the form of a portable oven) (*f*), a railway where the sleepers are imbedded in ballast (*g*), are actually part of the freehold and therefore exempt from distress. Certain articles, such as doors, windows, keys (*h*), and charters relating to the inheritance, being constructively part of the freehold (*i*), fall also under this head.

(b) Where the removal would be a cause of damage to the freehold.—Thus furnaces, millstones, and chimney pieces are privileged for this reason (*k*). So all fixtures (*l*), though liable to be taken in execution (*m*), are exempt from distress (*n*); nor does mere temporary removal of the fixture for some necessary purpose destroy the privilege (*o*). Machinery may be exempted from distress under this rule; but if it be attached to the freehold, not to improve the inheritance, but merely for its more convenient use as a chattel, and the connection be so slight that the removal can be effected without damage, it is not exempt (*p*).

(c) Where the goods seized could not be restored in the same condition (the reason being that at common law a distress was only a pledge in the hands of the landlord) (*q*).—The exemption of fixtures (*r*) is often put on this ground (*s*). A stocking frame upon which the weaving process is going on is privileged for this

(d) Bullen, Distress, 105.

(e) *Id.*, 106.

(f) See *Niblet v. Smith*, 4 T. R. 504.

(g) *Turner v. Cameron*, L. R. 5 Q. B. 306 (reported as *Turnor v. Cameron*, 22 L. T. 525). This would also be exempt for the reason next given.

(h) See *Gauntlett v. King*, 3 C. B. N. S. 59.

(i) *Gilb. Dist.* 39, 140; *Shep. Touch.* 90.

(k) *Simpson v. Hartopp*, 1 Sm. L. C. 437 (11th ed.), per Willes, C. J.

(l) See, as to fixtures, *post*, pp. 690 *et seq.*

(m) *Poole's case*, 1 Salk. 368.

(n) Bullen, Distress, 105; *Dallon v. Whittem*, 3 Q. B. 961; *Gauntlett v. King*, 3 C. B. N. S. 59 (as to gas fittings). See also under next head.

(o) Bullen, Distress, 106; *Gorton v. Falkner*, 4 T. R. 565, per Lord Kenyon, C. J.

(p) *Hollawell v. Eastwood*, 6 Exch. 295; approved (as to the law so laid down) in *Holland v. Hodgson*, L. R. 7 C. P. 328.

(q) *Ante*, p. 476.

(r) See the last paragraph.

(s) *Pitt v. Shew*, 4 B. & A. 206; *Darby v. Harris*, 1 Q. B. 895.

reason (*t*), and (at common law) so are growing crops (*u*). But under the statute 11 Geo. 2, c. 19 (*x*), a landlord may "take and seize (*y*) all sorts of corn and grass, hops, roots, fruits, pulse or other product whatsoever which shall be growing on any part" of the land demised, as a distress for arrears of rent. The italicized words, according to a common rule of construction, only embrace products *ejusdem generis* with those specified, and will not include trees or shrubs, for instance, growing in a nurseryman's grounds (*z*).

2. *Goods delivered in the way of trade*.—"Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ," are exempt from liability to distress (*a*). A public trade is one in which the trader invites the public to intrust him with their goods (*b*), or one carried on generally for the benefit of any persons who choose to avail themselves of it, as distinguished from a special employment by one or particular individuals (*c*). An artist, for instance, to whom a picture has been sent to be altered, is not a trader within the meaning of the rule (*d*). But a horse sent to a smith to be shod (*e*), materials sent to a weaver to be manufactured (*e*), cloth sent to a tailor to be made up (*f*), silk sent to a manufacturer's (*g*), a carriage sent for repairs to a coachmaker's (*h*), the carcass of a beast sent to a butcher to be slaughtered (*i*),—are all privileged (*k*). It will be noticed that the trade in question, in all such cases, is one that consists in dealing with other people's goods (*l*).

The true reason of the rule is not (as was once thought) that such goods do not presumably belong to the tenant, but solely for the benefit of trade (*m*), *i.e.*, for the benefit of the trade, not of the person sending the goods, but of the person to whom they are

(*t*) *Simpson v. Hartopp*, 1 Sm. L. C. 487. This would be exempt also for another reason: see *infra*, p. 500.

(*u*) 1 Ro. Ab. 666.

(*x*) Sect. 8.

(*y*) But he cannot cut or gather them before they are ripe: *id.*; *post*, p. 543.

(*z*) *Clark v. Gaskarth*, 8 Taunt. 431.

(*a*) *Simpson v. Hartopp*, *supra*.

(*b*) *Tapling v. Weston*, C. & E. 99, per Cave, J.; *Challoner v. Robinson*, W. N. 1907, p. 199.

(*c*) *Muspratt v. Gregory*, 1 M. & W. 633, per Parke, B. (a dissenting judgment: see *infra*, p. 499).

(*d*) *Von Knoop v. Moss*, 7 T. L. R. 500.

(*e*) Co. Lit. 47 a.

F.

(*f*) *Id.*; *Hurry v. Rickman*, 1 Moo. & R. 126.

(*g*) *Gibson v. Ireson*, 3 Q. B. 89.

(*h*) *Ward v. Ventom*, Peake, Add. Ca. 126.

(*i*) *Brown v. Shevill*, 2 A. & E. 138.

(*k*) *Parsons v. Gingell*, 4 C. B. 545, where it was held (following *Francis v. Wyatt*, 3 Burr. 1498) that a carriage standing at livery could be distrained, is apparently incorrect. See *Miles v. Furber*, L. R. 8 Q. B. 77, per Cockburn, C. J.

(*l*) *Muspratt v. Gregory*, *supra*, per Lord Abinger, C. B.

(*m*) Per Blackburn, J., in *Lyons v. Elliott*, 1 Q. B. D. 210.

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sent (*n*). The trade in question, for the rule to apply, must consequently be one *bonâ fide* carried on upon the premises. Thus, where pictures were deposited with a restaurant-keeper for sale on commission and were hung up so that they might be seen by the customers but not marked for sale, it was held that, although it was shown that the proprietor had sold various articles on commission before he took the restaurant, and that he described himself on his cards as a commission agent, there was no evidence that the business of a commission agent or any other business except that of a restaurant was being carried on, and that the goods were therefore not privileged (*o*). So goods bailed under the following circumstances are privileged, if delivered for the purpose of being dealt with by the bailee in the way of his trade:—Goods entrusted to a carrier (*p*), a pawnbroker (*q*), a wharfinger (*r*), a contractor for storing furniture (*s*), a commission agent (*t*), a factor or broker (*u*), a warehouseman (*v*), an auctioneer (*x*). (The goods and horses of guests at an inn, if within the premises of the inn itself (*y*), apparently fall within the same exemption (*z*.) But goods entrusted by their owner to a person carrying on business as a general agent, but acting in respect of them as his special agent and representative under an agreement, are not privileged (*a*).

In the case of the auctioneer, the privilege attaches whether the goods be lying in a public auction room or in a yard which forms part of his premises (*b*); and so long as he is *de facto* occupier (*c*), it makes no difference if such occupation be merely temporary, or even if it have been acquired wrongfully (*d*). But the mere custody of goods by an auctioneer on premises not occupied by him—whether the goods belong to the owner of such premises or not—does not protect them from distress, for a tenant cannot claim privilege for goods by merely calling in an auctioneer to sell them

(*n*) Per Parke, B., in *Joule v. Jackson*, 7 M. & W. 450.

(*o*) *Edwards v. Foz*, 60 J. P. 404.

(*p*) *Gisbourn v. Hurst*, 1 Salk. 249.

(*q*) *Swire v. Leach*, 18 C. B. N. S. 479.

(*r*) *Thompson v. Mashiter*, 1 Bing. 283.

(*s*) *Miles v. Furber*, L. R. 8 Q. B. 77. The decision in *Ex parte Russell*, 18 W. R. 753, seems difficult to reconcile with the judgments in this case.

(*t*) *Findon v. M'Laren*, 6 Q. B. 891.

(*u*) *Gilman v. Elton*, 3 B. & B. 75.

(*v*) *Matthias v. Menard*, 2 C. & P. 853. But the reason given by Best, C. J., in the first part of his judgment (though

to a certain extent borne out by dicta in *Thompson v. Mashiter*, *supra*, seems hardly correct: see at note (*f*), *infra*.

(*z*) *Adams v. Grane*, 1 Cr. & M. 380.

(*y*) *Crosier v. Tomkinson*, 2 Ld. Ken. 439.

(*a*) Bac. Ab. Inns and Innkeepers (B.), where, however, the object of the exemption is stated to be the security of travellers.

(*b*) *Tapling v. Weston*, C. & E. 99, Cave, J.

(*c*) *Williams v. Holmes*, 8 Exch. 861.

(*d*) See *Lyons v. Elliott*, *infra*.

(*e*) *Brown v. Arundell*, 10 C. B. 54.

on the premises (*e*). This doctrine would seem to be of general application (whatever the trade carried on by the bailee), and to show that the privilege (except in the case of the carrier (*e*)) is attached to his own premises and does not extend further (*f*).

The privilege thus arising is confined to the goods themselves, and will not be extended to articles of machinery sent with them for their more convenient manipulation (*g*); but it does extend to the instrument of conveyance by which the goods are carried to and from the place of manufacture (*h*), as, for instance, to a horse returning from a spinner's with yarn (*i*). If the goods, however, are not themselves privileged, neither will the conveyance be privileged; hence, for example, a barge sent by its owner to some salt works to bring away salt which he had bought there (*k*), or brewer's casks in which beer purchased by a publican had been carried to his house (*l*), were held not to be protected from distress. Privilege apparently also attaches to the goods during the period of their transmission at any place, either in going or returning, where it is reasonably necessary that they should be: thus yarn (on its return from a spinner's) at a house where it is taken to be weighed (*m*), or cattle pastured for a night on their way to market (*n*), are privileged from distress.

For privilege to attach, the goods must have been "delivered" in the way of trade, although perhaps there may be cases in which a constructive delivery would be sufficient (*o*). Consequently where a ship in process of construction in a dry dock was distrained upon for dock rent owing by its builder, it was held that no privilege attached, even if the property in the ship had vested in the person for whom it was being built, inasmuch as there had been no delivery within the meaning of the rule (*p*).

3. *Goods of a perishable nature.*—This exemption depends on the principle that the goods could not be restored again in the same plight and condition (*q*). Sheaves of corn (*r*), and the carcass of

(*e*) *Lyons v. Elliott*, 1 Q. B. D. 210.

(*f*) Bullen, Dist. 112. But see note (*v*), *supra*, and, as to privilege during transmission of the goods, see next paragraph.

(*g*) *Wood v. Clarke*, 1 C. & J. 484.

(*h*) *Id.*, at p. 498.

(*i*) *Read v. Burley*, Cro. Eliz. 549, 596. See, however, a criticism of this case in Bullen, Dist. 113.

(*k*) *Muspratt v. Gregory*, 1 M. & W. 633; affd., 3 M. & W. 677.

(*l*) *Joule v. Jackson*, 7 M. & W. 450.

(*m*) *Read v. Burley*, *supra*.

(*n*) *Tate v. Glead*, 2 Wms. Saund. 675 (ed. 1871); *Nugent v. Kirwan*, 1 Jebb & Sy. 97.

(*o*) Per Fry, L. J., in next-cited case.

(*p*) *Clarke v. Millwall Dock Co.*, 17 Q. B. Div. 494.

(*q*) *Simpson v. Hartopp*, 1 Sm. L. C. 437. Compare p. 496, *supra*.

(*r*) *Wilson v. Duckett*, 2 Mod. 61; *Simpson v. Hartopp*, *supra*, per Willes, C. J.

a slaughtered animal (*s*), afford instances in point; but wine in cask or bottle is not within the exemption (*t*). By statute 2 W. & M., sess. 1, c. 5, s. 3, however, the landlord distraining for rent in arrear "may seize and secure any sheaves or cocks of corn, or corn loose or in the straw, or hay lying or being in any barn or granary, or upon any hovel, stack, or rick, or otherwise upon any part of the land." The statute applies to corn whether in a threshed or unthreshed condition (*u*).

4. *Things in actual use*.—These are privileged on account of the probability of danger otherwise arising to the public peace (*x*). A horse, for example, actually being ridden (*y*), or an axe in a man's hand cutting wood (*y*), yarn being carried on a man's shoulders to be weighed (*z*), a stocking frame on which a person is actually engaged in weaving (*a*), clothing which is being worn (*b*), a horse, cart, and harness under personal care (*c*) (but not a dog not shown to be actually under personal control (*d*)), are all exempt from distress.

5. *Animals feræ naturæ*.—The ground of exemption here is that there is no legal property in these animals (*e*). When, however, animals that were once wild are tamed and reclaimed—*e.g.*, deer kept in inclosed ground for purposes of profit—the right of distress attaches (*f*). The question whether such animals are tamed and reclaimed depends on the facts of each particular case (*g*), such as their nature and condition, their mode of treatment, and the character of the place in which they are kept (*g*). In spite of an opinion of Lord Coke's to the contrary (*h*), it is now well settled that dogs are not within this exemption (*i*), and are, in fact, "goods" in which there may be a property (*k*).

6. *Goods in custody of the law*.—These are exempt because it is in terms repugnant that it should be lawful to take goods out of

(*s*) *Morley v. Pincombe*, 2 Exch. 101.

(*t*) *Ex parte Russell*, 18 W. R. 753.

(*u*) *Belasyse v. Burbridge*, 1 Lutw. 213.

(*x*) Notes to *Simpson v. Hartopp*, *supra*.

(*y*) Co. Lit. 47 a.

(*z*) *Read v. Burley*, Cro. Eliz. 549, 596.

(*a*) *Simpson v. Hartopp*, *supra*; and cf. note (*t*), p. 497, *supra*.

(*b*) See *Baynes v. Smith*, 1 Esp. 206, and note thereto. When not in actual use, wearing apparel is distrainable (*Bisset v. Caldwell*, Peake, 50), except as hereinafter stated: *infra*, p. 502.

(*c*) *Field v. Adames*, 12 A. & E. 649.

(*d*) *Bunch v. Kennington*, 1 Q. B. 679. (This and the preceding were cases of distress *damage feasant*, but the same principle applies.)

(*e*) Co. Lit. 47 a.

(*f*) *Davies v. Powell*, Willes, 46.

(*g*) See *Morgan v. Lord Abergavenny*, 8 C. B. 768.

(*h*) Co. Lit. 47 a.

(*i*) Notes to *Simpson v. Hartopp*, 1 Sm. L. C. 437. The question of property in various kinds of wild animals will be found discussed in *Hannam v. Mockett*, 2 B. & C. 934.

(*k*) See *R. v. Slade*, 21 Q. B. D. 433.

the custody of the law (*l*). Hence cattle, for instance, which have already been distrained *damage feasant* (*m*), or goods in the custody of a sheriff under a writ of execution (*n*), are privileged from distress; nor (in the latter case) does the statute forbidding the removal of goods taken in execution without paying a year's rent to the landlord (*o*) make any difference in this respect (*p*). The privilege, however, under an execution does not extend to a case where the sheriff has relinquished possession (*q*) (even though he may have done so only pending the trial of an interpleader issue under an order of which the landlord has been cognizant (*r*)), or where the execution has been waived (*s*), or where the sale under the execution is merely collusive and the goods remain on the premises (*t*); nor does it apply, apparently, to goods in the hands of a receiver (*u*). It will extend, however, to the goods in the hands of a purchaser from the sheriff, but only during the time he may reasonably require to remove them from the premises (*x*). But where the goods seized (being growing crops) are in such a state as not to be capable of removal (*y*), such time has been extended so as to protect them, in the hands of the purchaser, from being distrained for rent due subsequently to the purchase (*z*). The landlord, however, has now been expressly enabled to distrain in such a case by statute (*a*).

7. *Money*.—Loose money is privileged from distress, because "it will not be known again" (*b*), and hence could not be restored in the same condition (*c*). Hence, also, the privilege does not extend to money enclosed in a sealed bag (*d*).

8. *Straying cattle*.—Cattle (belonging to a stranger) which have strayed on to the tenant's lands through the latter's or his landlord's default in not repairing fences, are privileged from distress for rent (*e*). Such privilege, however, only lasts till a day and a

- (*l*) Gilb. Dist. 40.
- (*m*) Co. Lit. 47 a.
- (*n*) *Eaton v. Southby*, Willes, 131, per Willes, C. J.
- (*o*) 8 Anne, c. 14, s. 1; *ante*, p. 174.
- (*p*) *Wharton v. Naylor*, 12 Q. B. 673.
- (*q*) *Blades v. Arundale*, 1 M. & S. 711.
- (*r*) *Cropper v. Warner*, C. & E. 152, *Watkin Williams, J.*
- (*s*) *Seven v. Mihill*, 1 Ld. Ken. 370.
- (*t*) *Smith v. Russell*, 3 Taunt. 400.
- (*u*) *Re Sutton*, 32 L. J. Ch. 437, per Kindersley, V.-C.; cited *ante*, p. 493.

- (*x*) *In re Benn-Davis*, 55 L. J. Q. B. 217 (reported as in *In re Davis*, 54 L. T. 304).
- (*y*) *Wharton v. Naylor*, *supra*, explained in *In re Benn-Davis*, *supra*.
- (*z*) *Peacock v. Furze*, 2 B. & B. 362; *Wright v. Dewes*, 1 A. & E. 641.
- (*a*) 14 & 15 Vict. c. 25, s. 2; *infra*, p. 511.
- (*b*) Bac. Ab. Distress (B.).
- (*c*) Cf. pp. 496, 499, *supra*.
- (*d*) 1 Ro. Ab. 667.
- (*e*) See *Kempe v. Crew*, 1 Ld. Ray. 167; Bullen, Dist. 121.

night have passed (*f*); but the cattle cannot be taken until notice has been given to their owner (*g*). And if the cattle have either strayed by their owner's default, or are on the tenant's lands with their owner's consent, there is no privilege (*h*).

B. By statute.

1. *Wearing apparel, bedding, and tools.*—By the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 4, the wearing apparel and bedding of the tenant or his family, and the tools and implements of his trade to the value of 5*l.*, are to that extent privileged from distress. (It is presumed that this means 5*l.* in all, otherwise the privilege from execution in the County Court (*i*), which the privilege from distress follows, and that in the High Court (*k*), would be different.) The statute means that the landlord must leave at least five pounds' worth of the classes of goods specified; and if there is no such article on the premises which is of less value, the protection which it gives is not taken away merely because he has to leave something which is worth more (*l*). But this enactment does not "extend to any case where the lease, term, or interest of the tenant has expired, and where possession of the premises in respect of which the rent is claimed has been demanded, and where the distress is made not earlier than seven days after such demand" (*m*).

The term "bedding" as employed in the above provision intends whatever is used by the tenant for purposes of sleeping accommodation, and therefore includes the bedstead (*n*). An article is an implement of the tenant's trade within it if belonging to or hired by him for the support of himself and his family, though actually worked by his wife as his agent (*o*). And it makes no difference that the property in it (as where it has been obtained under a hire-purchase agreement instalments payable under which are still due) is outstanding at the time in a third party;

(*f*) For distress the cattle must, as it is said, have been *levant and couchant*.

(*g*) *Kempe v. Crews*, *supra*.

(*h*) *Jones v. Powell*, 5 B. & C. 647.

(*i*) 51 & 52 Vict. c. 43, s. 147, re-enacting 9 & 10 Vict. c. 95, s. 96.

(*k*) 8 & 9 Vict. c. 127, s. 8. On the other hand, in the privilege from distresses issued by courts of summary jurisdiction for non-payment of sums adjudged to be paid by convictions or orders—a privilege embracing the same classes of goods—the 5*l.* limit applies

to the tools and implements of trade only: 42 & 43 Vict. c. 49, s. 21.

(*l*) *Lavell v. Richings*, [1906] 1 K. B. 480.

(*m*) 51 & 52 Vict. c. 21, s. 4. As to summary remedy where goods exempt under this provision are distrained, see 58 & 59 Vict. c. 24, s. 4: *post*, p. 583.

(*n*) *Davis v. Harris*, [1900] 1 Q. B. 729.

(*o*) *Churchward v. Johnson*, 54 J. P. 326. As to implements of trade, see *infra*, p. 510.

notwithstanding that the statute in question in terms confers privilege only on "goods of the tenant or his family which would be protected from seizure in execution" *under the County Courts Act*, and that such an article, not being the property of the tenant, and therefore not being liable to be taken in execution against him under any circumstances, is clearly not protected "under" that Act (*p*). The truth seems to be that the framers of the statute lost sight of the fact that distress—unlike execution—can be levied on goods not the property of the tenant at all; and the case, as pointed out in the judgments, being clearly "within the mischief" of the Act, the Court has construed the statute as if its language were that all goods should be privileged which *if the property of the tenant* would be protected from seizure under the County Courts Act (*q*).

2. *Agricultural machinery and breeding stock*.—In the case of tenancies to which the Agricultural Holdings Act, 1883 (*r*), applies (*s*), "agricultural or other machinery which is the *bonâ fide* property of a person other than the tenant, and is on the premises of the tenant under a *bonâ fide* arrangement with him for the hire or use thereof in the conduct of his business, and live stock of all kinds which is the *bonâ fide* property of a person other than the tenant, and is on the premises of the tenant solely for breeding purposes," are absolutely exempt from liability to distress (*t*).

3. *Gas, water, electric, and hydraulic meters, fittings, and machinery*.—Where "power" in one of the above forms is supplied upon any premises, it is very usual for the "undertakers" to supply also fittings and machinery for its more advantageous use, as well as meters for measuring the amount used. Such things are specially privileged from distress by the landlord.

(a) Gas.—Under 10 & 11 Vict. c. 15, s. 14, and 34 & 35 Vict. c. 41, s. 18 (the former section is now repealed (*u*) except so far as incorporated with special Acts to which the latter does not apply), meters and fittings,—*i.e.*, any apparatus, including a stove, used for

(*p*) *Masters v. Fraser*, 85 L. T. 611.

(*q*) This decision appears to afford a good instance of what is sometimes called the "benevolent" construction of a statute.

(*r*) 46 & 47 Vict. c. 61.

(*s*) See ss. 54, 61, *post*, pp. 728, 729.

(*t*) Sect. 45. As to the procedure available on a dispute arising under this section, see sect. 46, *post*, p. 581.

(*u*) 38 & 39 Vict. c. 66 (referred to in, but so far as here material not affected by, the Stat. Law Rev. Act, 1894, 57 & 58 Vict. c. 56).

the supply and consumption of gas (*x*)—let for hire by the undertakers, are exempt.

(β) Water.—Under 26 & 27 Vict. c. 93, s. 14, meters and instruments let for hire to consumers by undertakers duly authorized, and pipes and apparatus for the conveyance, reception, or storage of the water, are exempt. Also, by 10 & 11 Vict. c. 17, s. 44, communication pipes, and other necessary works, laid down by the undertakers in dwelling-houses not exceeding 10*l*. in annual value for domestic water supply, are exempt.

(γ) Electricity.—Under the Electric Lighting Act, 1882 (45 & 46 Vict. c. 56 (*y*)), electric lines, meters, accumulators, fittings, works or apparatus (*z*), belonging to the undertakers, if placed upon premises not in their possession for the purpose of supplying electricity, are exempt.

(δ) Hydraulic power.—Under private Acts, machinery belonging to undertakers supplying hydraulic power by virtue of those Acts, erected and let to hire for the purpose of supplying such motive power, is usually exempt (*a*).

4. *Frames, looms, and apparatus used in textile manufactures.*—By 6 & 7 Vict. c. 40 (*b*), frames, looms, or machines, materials, tools, or apparatus, intrusted, whether by hire or not, for the purposes of being used or worked in woollen, worsted, linen, cotton, flax, mohair, and silk manufactures, are exempt from distress for rent, unless the rent be due by the owner of such machine or any part thereof.

5. *Railway rolling stock.*—By 35 & 36 Vict. c. 50 (*c*), railway rolling stock which is in a “work” is exempt from distress for rent payable by a tenant of the work, if such rolling stock is not the actual property of such tenant, and if the actual ownership is sufficiently indicated by a distinguishing mark upon it. If it be partly the tenant’s property, the landlord may distrain upon it to the extent of the tenant’s interest in it (*d*).

(*x*) *Gas Light, &c., Co. v. Hardy*, 17 Q. B. Div. 619.

(*y*) Sect. 25.

(*z*) See, for interpretation, sect. 32.

(*a*) See, for instance, 34 & 35 Vict. c. cxxi., s. 38; 47 & 48 Vict. c. cxxi., s. 26.

(*b*) Sect. 18. As to summary remedy when goods exempt under this provision are distrained, see sect. 19.

(*c*) Sect. 3.

(*d*) Sect. 5.

A "work" in the above enactment means any establishment or place used for the purpose of trade or manufacture, which is connected with a line of railway by sidings along which the rolling stock may be propelled (*e*), and is not confined to the things specified in the definition clause (*f*).

6. *Crops and farming stock*.—Reference has already been made (*g*) to an Act passed to regulate the sale of farming stock taken in execution (*h*). When compliance has been made with its provisions (which prevent the sheriff from selling certain specified crops and produce in any case, and certain others only where the tenant has undertaken by deed or writing with the landlord not to remove them from the premises, unless the purchaser enters into a written agreement to consume them on the premises), corn, hay, straw, or other produce, which at the time of such sale and the execution of such agreement is severed from the soil and sold, subject to such agreement, by the sheriff, turnips, whether drawn or growing, sold under the provisions of the Act, and horses, sheep, cattle, beasts, waggons, carts, and other implements of husbandry kept or used on the land by any persons for threshing, carrying, or consuming such produce or turnips, are absolutely privileged from distress (*i*).

The protection, however, given to the purchaser is only to have the property kept on the premises so long as is necessary for the purposes of the assignment by the sheriff (*k*), so that if any of it is removable as between landlord and tenant it should be removed as soon as possible (*k*). It is also restricted to purchasers who have executed the required agreement with the sheriff, and with regard to the corn, hay, straw, and other produce, to cases where they are already severed from the soil at that time (*l*). Where not so severed the statute does not apply at all, and the matter is governed by a different law (*m*), such produce being in that case formerly within the protection allowed by the common law for a reasonable time after sale (*n*), and now (as to subsequently accruing rent) within the qualified protection given by statute (*o*) only in the case

(*e*) *Easton Estate Co. v. Western Waggon Co.*, 54 L. T. 735, per Wills, J.

(*f*) Sect. 2. See this section also for interpretation of the terms "rolling stock," "rent," and "tenant," as above used. The Act further provides (sects. 4, 5, 6) a procedure to be employed in case of disagreements arising under it.

(*g*) *Ante*, p. 293.

(*h*) 56 Geo. 3, c. 50.

(*i*) Sect. 6. The section is not set out literally.

(*k*) *Hutt v. Morrell*, 11 Q. B. at p. 441, per Parke, B.

(*l*) See the last paragraph.

(*m*) Per Littledale, J., in next-cited case.

(*n*) *Wright v. Dewes*, 1 A. & E. 641; *supra*, p. 501.

(*o*) 14 & 15 Vict. c. 25, s. 2.

where a sufficient distress of the tenant's goods apart from it can be found (*p*).

7. *Goods of ambassadors*.—By 7 Anne, c. 12, s. 3, the goods and chattels of ambassadors or other public ministers of any foreign prince or state, and those of their servants, are absolutely privileged from distress. The ambassador must have been authorized and received as such by the Crown: but the privilege seems to extend to the case where a British subject becomes a member of a foreign embassy resident in England, and no express condition to the contrary has been imposed at the time he is so received by the government (*q*).

With regard to his servants, provided the service be a *bonâ fide* one (*r*), the privilege is not confined to those of a domestic character (though that word is used in the statute) (*s*), for the statute is only explanatory of the law of nations, and has been held even to extend to a secretary (*t*). But if the servant does not live in his master's house, it will not extend to goods in his own which are not necessary for the convenience of the ambassador (*u*).

8. *Goods of lodgers*.—By 34 & 35 Vict. c. 79, "if any superior landlord shall levy or authorize to be levied a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord or the bailiff or other person employed by him to levy such distress with a declaration in writing (*x*) made by such lodger setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such lodger; and also setting forth whether any and

(*p*) *Infra*, p. 511.

(*q*) *Macartney v. Garbutt*, 24 Q. B. D. 368. (This was a case as to parish rates, but the same principle would appear to apply.)

(*r*) See *Lockwood v. Coysgarne*, 3 Burr. 1676.

(*s*) See *Hopkins v. De Robeck*, 3 T. R. 79.

(*t*) See *Triquet v. Bath*, 3 Burr. 1478.

(*u*) *Novello v. Toogood*, 1 B. & C. 554. The remark in note (*q*), *supra*, applies also here.

(*x*) It appears to have been thought, in *Lowe v. Dorling*, 93 L. T. 398, when the case was before the County Court, that the declaration required a stamp. By the Stamp Act, 1891 (54 & 55 Vict. c. 39), 1st sched., a stamp of 2s. 6d. is required for a "statutory declaration." This, by sect. 21 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), means a declaration made by virtue of the Stat. Decl. Act, 1835 (5 & 6 Will. 4, c. 62), and the declaration here spoken of cannot, as it would seem, answer that description.

what rent is due and for what period from such lodger to his immediate landlord; and such lodger may pay to the superior landlord or to the bailiff or other person employed by him as aforesaid the rent, if any, so due, as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord. And to such declaration shall be annexed a correct inventory subscribed by the lodger of the furniture, goods, and chattels referred to in the declaration; and if any lodger shall make or subscribe such declaration and inventory, knowing the same or either of them to be untrue in any material particular, he shall be deemed guilty of a misdemeanour" (y). "If any superior landlord, or any bailiff or other person employed by him, shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person the rent, if any, which by the last preceding section such lodger is authorized to pay, shall (z) levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such superior landlord, bailiff, or other person shall be deemed guilty of an illegal distress (a), and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods; and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just; and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into" (b). It has been held (after much difference of judicial opinion as to its true construction), that inasmuch as this section in terms directs that the parties to be deemed guilty of an illegal distress within its provisions include, besides the superior landlord, "any bailiff or other person employed by him," it is not the effect of the concluding clause to confine the action for illegal distress to the landlord himself, but that the action would lie against the bailiff (c).

The word *lodger* in this Act must be taken to mean a lodger according to the understanding of that word by the majority of

(y) Sect. 1.

(z) *Sic.*

(a) As to this, see p. 573, *post.*

(b) Sect. 2.

(c) *Love v. Dorling*, [1906] 2 K. B. 772 (C. A.), affirming judgment below,

[1905] 2 K. B. 501 (reported as *Lucy v. Dorling*, 21 T. L. R. 616); overruling *Page v. Vallis*, 19 T. L. R. 393, where it was held that such action could not be maintained against the landlord's solicitor.

persons conversant with the modes of letting (and occupying) houses in this country to lodgers and undertenants (*d*). The existence of the relationship of landlord and lodger is a question of fact, the principal element—though apparently not an absolutely essential one (*e*)—being the retention of control and dominion on the part of the former (*f*). But this does not mean that where the matter is tried by a jury the question whether the occupier is a lodger or not is to be submitted *simpliciter* to them (for this in effect would be leaving to them the construction of the statute), but it is for the Court to leave to them the findings of fact, and direct them, according to those findings, whether the relationship is made out or not (*d*). The mere right of exclusive occupation, even of a very considerable portion (but not, probably, of the whole (*g*)) of a house, is not inconsistent with it (*h*), though at the same time the relationship between the parties be more properly that of undertenancy (*h*). Nor does the mere circumstance that the landlord, on the one hand, or any agent on his behalf, does not sleep on the premises (*i*), nor that the lodger, on the other, has separate and uncontrolled power of ingress and egress (*k*), prevent it from arising. It has, however, been held that to constitute a person a lodger under the Act he must reside in the popular sense, *i.e.*, sleep upon the premises, and that a mere occupation for business purposes during the day-time is insufficient (*l*). The general question seems one not unlikely to arise in the case of buildings let out in flats: but though, as commonly happens in such a case, a resident porter be employed by the landlord on the premises, it seems very doubtful whether the statute would protect the tenant (*m*).

(*d*) *Morton v. Palmer*, 51 L. J. Q. B. 7, per Brett, L. J. See as to lodgers generally, *ante*, pp. 8, 9.

(*e*) See *infra*, note (*h*).

(*f*) *Ness v. Stephenson*, 9 Q. B. D. 245. A full discussion of the question will be found in *Bradley v. Baylis*, 8 Q. B. Div. 195, and in *Kent v. Fittall*, [1906] 1 K. B. 60.

(*g*) Per Lindley, J., in next-cited case.

(*h*) *Phillips v. Henson*, 3 C. P. D. 26. This case seems "near the line," and where there exists a real undertenancy the retention of control on the part of the lessor which, as already seen, is the principal point to be looked at, is necessarily absent: see *ante*, p. 8, and *infra*, note (*k*).

(*i*) *Morton v. Palmer*, *supra*; *Page v. Vallis*, *supra* (overruled on another

point). In the next-cited case the lodger in fact acted as caretaker of the reserved portion of the premises.

(*k*) *Ness v. Stephenson*, *supra*. It seems a little difficult to see what control the lessor in this case had over the portion of the premises which he had let, and it is thought that the only ground on which it could properly be supported is that of *Phillips v. Henson*, *supra*, that the Act (being one intended to benefit persons living with others in the houses of the latter) may be construed, under certain conditions, as applying to undertenants.

(*l*) *Heavood v. Bone*, 13 Q. B. D. 179.

(*m*) See *R. v. St. George's Union*, L. R. 7 Q. B. 90 (reported as *Mutual Tontine, &c., Association v. St. George's Union*, 25 L. T. 696); cited *ante*, p. 8.

To obtain the benefit of the statute it is not necessary that the lodger should have entered directly under the "immediate tenant" for whose rent the distress is levied by the superior landlord; it is sufficient that the person under whom he enters is at the time in ostensible legal possession of the premises with the consent of such tenant (*n*). Where, for instance, a person was let into possession by a tenant pending negotiations (which afterwards went off) for an assignment of the lease, it was held that a lodger under him was entitled, upon a distress being levied for the original tenant's rent, to avail himself of the provisions of the Act (*o*).

The declaration and inventory required by the statute (*p*) are applicable only to the particular distress which renders them necessary, and must be made after that distress has been levied or authorized: so that if the superior landlord should distrain a second time, they must be served afresh in order to protect the goods (*q*). The conditions imposed by the legislature must (as it has been said) be rigidly complied with in order to deprive the landlord of his remedy at common law, and to bring the lodger within the protection of the statute (*q*). But the declaration is not invalid merely because it does not state expressly that the declarant is a lodger, and (where no rent is in fact due from him) merely because it contains no statement in terms to that effect (*r*). It should, however, always have reference to the existing rights of the parties as ascertained at the moment when the distress is levied (*s*), and the person endeavouring to avail himself of the statute must always be able to make out that he was a lodger *at that time* (*t*). It has also been held that an inventory—though not signed at the end—was sufficiently "subscribed" by a lodger, where it followed the declaration on the same piece of paper, the declaration being signed by him, and referring to the inventory as being correct (*u*).

It will be observed that the statute specifies no time within which the lodger must serve his declaration. Where a landlord distrained upon goods of his tenant's lodger, and unlawfully sold them before the expiration of five clear days (*x*), it was held that an action was maintainable against him by the lodger, although

(*n*) Per Lord Russell, C. J., in next-cited case.

(*o*) *Bensing v. Ramsay*, 62 J. P. 613.

(*p*) See forms in Bullen on Distress, pp. 304, 305 (2nd ed.).

(*q*) *Thwaites v. Wilding*, 12 Q. B. Div. 4.

(*r*) *Ex parte Harris*, 16 Q. B. Div. 130.

(*s*) *Thwaites v. Wilding*, *supra*, per Bowen, L. J.

(*t*) *Morton v. Palmer*, *supra*.

(*u*) *Godlington v. Fulham Property Co.*, [1905] 1 K. B. 431.

(*x*) *Post*, p. 549.

his declaration was only made after the five days had expired and after the sale had taken place (y).

II.—QUALIFIED PRIVILEGE.

The following kinds of goods enjoy a qualified privilege, *i.e.*, are protected from distress only when a sufficient distress on the premises apart from them can be found. The burden of proof in such a case is on the landlord to show that there was no other sufficient distress, and not on the tenant to show that there was (z). To establish the privilege there must be on the premises goods (of sufficient value to answer the distress) which are *immediately* available to raise the arrears of rent by sale, so that growing crops, for instance, which cannot be productive till a later period, are not to be reckoned (a); and it has been ruled (in the case where the privilege is conferred by common law (b)) that goods on the premises belonging to strangers, which the landlord does not choose to take, are not to be counted either (c). And all that is required to destroy the privilege attaching to such goods is that reasonable grounds should exist for thinking that without taking them there will not be sufficient to satisfy the rent; for the mere fact that it afterwards turns out that there was will not render the distress wrongful (d). Nor is there any rule, where such goods have been seized with others, that they should not be sold until after the others have been disposed of (d).

A. *By common law.*

Tools and implements of trade.—Apart from the absolute privilege attaching to them (as to other things) when in actual use (e), and (to the 5*l.* limit) under the Law of Distress Amendment Act (f), tools and implements of trade are privileged when (and only when (g)) there is other sufficient distress on the premises (h).

(y) *Sharp v. Fowle*, 12 Q. B. D. 385.

(z) *Dawson v. Alford*, Dy. 312, explained in *Nargett v. Nias*, 1 E. & E. 439.

(a) *Piggott v. Birtles*, 1 M. & W. 441.

(b) *I.e.*, in the case of implements of trade: see under next head.

(c) *Roberts v. Jackson*, Peake, Add. Ca. 36. The statute 14 & 15 Vict. c. 25, s. 2 (*infra*, p. 511), expressly follows this principle, but the statutes 51 Hen. 3, stat. 4, and 46 & 47 Vict.

c. 61, s. 45 (*infra*, p. 511), speak only of no other sufficient distress (without confining it to the tenant's own goods) being found.

(d) *Jenner v. Yolland*, 6 Price, 3.

(e) *Supra*, p. 500.

(f) 51 & 52 Vict. c. 21, s. 4; *supra*, p. 502.

(g) *Gorton v. Falkner*, 4 T. R. 565.

(h) *Nargett v. Nias*, 1 E. & E. 439; *Simpson v. Hartopp*, 1 Sm. L. C. 437.

Looms (*i*), stocking frames (*k*), kneading troughs (*l*), threshing machines (*m*), and implements of husbandry generally (*n*), are instances in point. Ledgers, day-books, and papers possibly fall within the same rule (*o*). A cab, though only hired by its driver by the week, has been held to be an "implement" of his trade (*p*).

B. By statute.

1. *Beasts of the plough and sheep*.—By 51 Hen. 3, stat. 4, no person shall be distrained by his beasts that "gain his land," nor by his sheep, if any other sufficient distress can be found. Beasts that gain (or improve) the land clearly include beasts of the plough (*q*); but not those (*e.g.*, heifers, young steers, and unbroken cart colts) which merely benefit the land by manuring it (*r*). The privilege is not restricted to animals belonging to the tenant himself (*r*).

2. *Growing crops seized and sold under an execution*.—It has already been stated that growing crops seized under a writ of execution were, in the hands of a purchaser, formerly absolutely privileged from distress (*s*). Now, however, in case all or any part of a tenant's growing crops shall be so seized and sold, "such crops, so long as the same shall remain on the farms or lands, shall, in default of sufficient distress of the goods and chattels of the tenant (*t*), be liable to the rent which may accrue and become due to the landlord after any such seizure and sale, and to the remedies by distress for recovery of such rent, and that notwithstanding any bargain and sale or assignment which may have been made or executed of such growing crops by any . . . sheriff or other officer" executing the writ (*u*).

3. *"Agisted" live stock (x)*.—Under the Agricultural Holdings Act (*y*), "where live stock (*z*) belonging to another person has

(*g*) *Gorton v. Falkner*, *supra*; *Harvey v. Pocock*, 11 M. & W. 740.

(*k*) *Simpson v. Hartopp*, *supra*.

(*l*) *Roberts v. Jackson*, Peake, Add. Ca. 36.

(*m*) *Fenton v. Logan*, 9 Bing. 676.

(*n*) See *Davies v. Aston*, 1 O. B. 746.

(*o*) *Gauntlett v. King*, 3 C. B. N. S. 59, where it was assumed throughout that they did, though with doubtful correctness. See per Williams, J., at p. 61.

(*p*) *Lavell v. Richings*, [1906] 1 K. B. 480.

(*q*) Com. Dig. Distress (C.).

(*r*) *Keen v. Priest*, 4 H. & N. 236.

(*s*) *Supra*, p. 501.

(*t*) Cf. *supra*, p. 510, note (*c*).

(*u*) 14 & 15 Vict. c. 25, s. 2. Cf. *supra*, p. 501.

(*x*) At common law such stock has been said to be distrainable (1 Roll. Ab. 669); but if delivered to an agister in the regular way of his trade it would seem absolutely privileged under the rule already (*supra*, p. 497) dealt with (see per Mellor, J., in *Miles v. Furber*, L. R. 8 Q. B. 77).

(*y*) 46 & 47 Vict. c. 61, s. 45. As to the procedure available on a dispute arising under this section, see sect. 46, *post*, p. 581.

(*z*) This term, by sect. 61, includes "any animal capable of being distrained." Cf. p. 500, *supra*.

been taken in by the tenant of a holding to which this Act applies (a), to be fed at a fair price agreed to be paid for such feeding by the owner of such stock to the tenant, such stock shall not be distrained by the landlord for rent where there is other sufficient distress to be found, and if so distrained by reason of other sufficient distress not being found there shall not be recovered by such distress a sum exceeding the amount of the price so agreed to be paid for the feeding, or if any part of such price has been paid, exceeding the amount remaining unpaid, and it shall be lawful for the owner of such stock, at any time before it is sold, to redeem such stock by paying to the distrainor a sum equal to such price as aforesaid, and any payment so made to the distrainor shall be in full discharge as against the tenant of any sum of the like amount which would be otherwise due from the owner of the stock to the tenant in respect of the price of feeding; provided always, that so long as any portion of such live stock shall remain on the said holding, the right to distrain such portion shall continue to the full extent of the price originally agreed to be paid for the feeding of the whole of such live stock, or if part of such price has been *bonâ fide* paid to the tenant under the agreement, then to the full extent of the price then remaining unpaid."

The fair price mentioned in the above enactment need not necessarily be of money. Hence cows, for instance, agisted on the terms that the agister should take their milk in exchange for their pasturage, are privileged from distress within the statute (b). But it must be a payment for the feed of cattle merely, and not for an interest in the land or in the nature of rent for use and occupation; so that an agreement to allow the owner of stock "the exclusive right to feed the grass on the land" for a specified period does not confer on such stock the privilege from distress given by the Act (c).

(a) Sects. 54, 61; *post*, pp. 728, 729.

Belton, 15 Q. B. D. 457.

(b) *London and Yorkshire Bank v.*

(c) *Masters v. Green*, 20 Q. B. D. 807.

CHAPTER IV.

DISTRESS—WHEN AND WHERE.

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(A.) *When.*

Generally.—Rent not being actually in arrear until the day on which it is due has elapsed (*a*), it follows that a distress can be made on, but not before, the following day (*b*); except where the right to distrain is postponed by express stipulation in the contract of tenancy (*c*). At common law a distress could only be made during the continuance of the demise (*d*), although the tenant continued in occupation afterwards (*e*). So where the landlord has resumed possession of the demised premises by the exercise of his right of re-entry, or by some proceeding equivalent thereto, the right to distrain is gone (*f*). Where, for instance, upon a company who held premises under an agreement for a lease going into liquidation, a receiver was appointed in a debenture-holders' action, and possession was subsequently given up by him to the lessors under an order made in an action by the lessors for specific performance, it was held that the latter had no right to distrain goods of the debenture-holders left on the premises, even though such

(a) *Ante*, p. 119.

(b) Co. Lit. 47 b, note (6); Bullen, Dist. 138.

(c) *Ante*, p. 476.

F.

(d) Co. Lit. 47 b; preamble to sect. 6 of next-cited statute.

(e) *Williams v. Stiven*, 9 Q. B. 14.

(f) See per Chitty, J., in next-cited case.

order was in its nature not final, but (at the lessors' option) only by way of security for the rent (*g*).

Under stat. 8 Anne, c. 14.—The stat. 8 Anne, c. 14, made it lawful (*h*) for any persons having "rent in arrear or due upon any lease for life or lives, or for years, or at will, ended or determined, to distrain for such arrears after the determination of the said respective leases, in the same manner as they might have done if such lease or leases had not been ended or determined; provided (*i*) that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due."

The statute only applies (*j*) where the lease is determined by effluxion of time or perhaps also by notice to quit (*k*), and not where it is defeated by the voluntary act of the lessee, as where he commits a forfeiture (*l*); and it follows that a distress after a writ in ejectment to enforce a forfeiture for rent due before the forfeiture is unlawful (*m*). The possession moreover retained by the tenant, though it need not be of the whole of the premises (*n*), must, in order to justify the distress under sect. 7, be an exclusive possession (*o*); the mere fact, for instance, of leaving goods on the premises is not sufficient (*p*), and *à fortiori* when, he himself having quitted the premises, possession (though not complete possession) has been taken by another tenant (*q*).

On the other hand, the "possession of the tenant" has been held to extend to a possession retained after his death by his personal representative (*r*), though it has been said that this ought to be limited to the case where the executor or administrator becomes tenant under the lease in his testator's place, and where the arrears distrained for have not actually fallen due until after such death (*s*); at all events, the rule has been held not to apply where

(*g*) *Murgatroyd v. Old Silkestone, &c.*, Co., 65 L. J. Ch. 111.

(*h*) Sect. 6.

(*i*) Sect. 7.

(*j*) See the preamble to sect. 6.

(*k*) *Doe v. Williams*, 7 C. & P. 322, per Patteson, J. But tenancies at will seem clearly not within the scope of this dictum. See *post*, p. 600.

(*l*) *Kirkland v. Briancourt*, 6 T. L. R. 441; *Grimwood v. Moss*, L. R. 7 C. P. 360.

(*m*) See per Willes, J., in last-cited case. Similarly as to distress for subsequent rent: *ante*, p. 480.

(*n*) *Nuttall v. Staunton*, 4 B. & C. 51. Where possession is only retained of part of the premises, the distress must apparently be levied in that part: *id.*

(*o*) *Taylorson v. Peters*, *infra*, per Patteson, J.

(*p*) *Gray v. Stait*, 11 Q. B. Div. 668, per Bowen, L. J.

(*q*) *Taylorson v. Peters*, 7 A. & E. 110.

(*r*) *Brathwaite v. Cooksey*, 1 H. Bl. 465.

(*s*) Per Crompton, J., in *Turner v. Barnes*, *infra*. In *Wilkinson v. Peel*, [1895] 1 Q. B. 516, decided against the landlord on another ground (*infra*, p. 515), this point was not taken.

the tenancy itself (as in the case of a tenancy at will (*t*)) is determined by the death of the tenant, and *à fortiori* where in such case probate or administration has not, at the time of the distress, been taken out to him (*u*). But if this be so, it is difficult to see how the statute can apply to tenancies for life (to which it expressly refers), unless the leases for life therein mentioned are to be limited to leases *pur autre vie*, which seems unlikely.

The holding over by the tenant contemplated by the statute need not be tortious, but may be by permission of the landlord (*x*). And where after the determination of the tenancy the relationship created by it between the parties continues for a particular purpose (*y*) (e.g., of allowing the tenant to stack his corn on the premises for a specified period), either by custom (*z*) or by agreement (*a*), the additional period so given operates as "a kind of . . . modified continuation" of the term (*b*), so that the interval of six months allowed by the statute for a distress does not begin to run while that period lasts (*c*). The same thing too applies where the term is prolonged after its determination by force of the statute (*d*) which gives a tenant of agricultural property, holding under a landlord whose interest determines by his death, the right to hold (in lieu of emblements (*e*)) until the end of the current year of the tenancy; so that this provision, which gives the succeeding landlord the right to "recover and receive" a rent apportioned from the time of such death to the end of such year, entitles him to recover it (not only by action, but) by distress within six months after the latter date and not necessarily the former (*f*).

But though the holding over may be one with the landlord's permission, the statute (as it has been held) only applies where there is a holding over (*g*); so that where a tenant under notice to quit entered into an agreement with his landlord for a fresh tenancy of a portion of the demised premises, to commence from the expiration of the notice, it was held that the statute did not entitle the landlord after such expiration to distrain on the premises included in the new demise for arrears of rent reserved by the old (*h*). It will

(*t*) *Post*, p. 597.

(*u*) *Turner v. Barnes*, 2 B. & S. 435.

(*x*) *Nuttall v. Staunton*, 4 B. & C. 51.

(*y*) See *post*, p. 721.

(*z*) *Beavan v. Delahay*, 1 H. Bl. 5.

(*a*) *Knight v. Bennett*, 3 Bing. 364 (where the tenant had been restrained by injunction from carrying the corn away); *Re Powers*, 63 L. T. 626.

(*b*) Bullen, Dist. 140.

(*c*) Cases in notes (*z*) and (*a*), *supra*.

(*d*) 14 & 15 Vict. c. 25, s. 1.

(*e*) *Post*, p. 715.

(*f*) *Haines v. Welch*, L. R. 4 C. P. 91.

(*g*) See the preamble to sect. 6.

(*h*) *Wilkinson v. Peel*, [1895] 1 Q. B. 516.

be noticed, however, that neither the enacting words of sect. 6, nor the enumeration in sect. 7 of the conditions which have to be fulfilled for the statute to apply, make any reference to holding over as being necessary (*i*); and the difference between a holding over which is by permission of the landlord and a new tenancy is not perhaps in principle very obvious (*k*). Possibly in the case of a new tenancy under a distinct agreement, the landlord ought to be held to have "contracted himself out of the Act" by means of an estoppel.

Duration of right to distrain.—The right of distress continues as long as the reversion lasts, but not afterwards (*l*), so that a distress cannot be made after the lessor's title has been extinguished by the Statute of Limitations (*m*); but, as has already been pointed out (*n*), while the term granted by a lease is actually running the rent reserved may be distrained for whatever the length of time which may have elapsed since its last payment (*o*).

Hours for distress.—With regard to the *hour*, it should be stated here that the landlord can only distrain for his rent in the day-time (*p*), the limits of which are for this purpose those of sunrise and sunset, and not the wider ones of daybreak and dusk (*q*). Nor is it apparently lawful to distrain on a Sunday (*r*).

A distress which violates the above rule is illegal *ab initio* (*s*). But it has been ruled—though it would seem incorrectly (*t*)—that the tenant may waive such illegality so as to prevent third persons whose goods have been seized from taking advantage of it (*u*).

(B.) *Where.*

Generally.—By the Statute of Marlebridge (*x*), it is unlawful for any person (except the Crown or its officers) to make a distress

(*i*) Indeed, the last clause in sect. 7 strongly suggests the contrary.

(*k*) In *Nuttall v. Staunton*, *supra*, it seems difficult to resist the conclusion that the holding (see the fifth plea in bar, at pp. 52-3 of the report) was under a new tenancy, and the (successful) argument for the landlord was based expressly on the contention that the creation of a new tenancy made no difference. The case, however, was argued on demurrer, and is perhaps to be regarded chiefly as an authority on mere pleading. The actual decision in *Wilkinson v. Peel*, as pointed out at p. 514, *supra*, can perhaps, if necessary, be sustained on another ground.

(*l*) *Ante*, p. 484.

(*m*) *Post*, pp. 677 *et seq.*

(*n*) *Ante*, p. 173.

(*o*) *Grant v. Ellis*, 9 M. & W. 113. As to amount recoverable, see p. 522, *post*.

(*p*) Co. Lit. 142 a.

(*q*) *Tutton v. Darke*, 5 H. & N. 647.

(*r*) See *Werth v. London and Westminster Loan Co.*, 5 T. L. R. 521, per Mathew, J.

(*s*) See p. 572, *post*.

(*t*) See *Perring v. Emerson*, [1906] 1 K. B. 1, per Wills, J.

(*u*) *Werth v. London and Westminster Loan Co.*, *ubi sup.*

(*x*) 52 Hen. 3, c. 15.

out of his fee, or in the king's highway, or in the common street. This statute is only in affirmance of the common law (*y*), for even apart from it no landlord has a right to distrain upon any lands not included in the demise (*z*), out of which the rent distrained for issues (*a*), *e.g.*, upon lands over which the tenant has only rights in the nature of easements appurtenant to the land demised (*b*). So he cannot distrain goods belonging to a third person which have been removed by their owner to avoid a distress and subsequently brought back again to the demised premises by himself (*c*). But the distress may be made upon any part of the demised land, as the entire rent issues out of every part (*d*); thus, where a single rent issues out of lands in the occupation of several tenants, a distress for the whole amount may be made upon the land of any one of them (*e*), and the same thing holds where part of premises demised at a single rent is in the hands of an assignee (*f*).

It follows that where lands are let by separate demises, though contained in the same deed, and though made to the same tenant, a joint distress cannot be levied upon them even if the rent be in arrear in all (*g*), as the effect of this would be to make the rent of one issue out of another (*h*); but such a distress is wrongful only if something be actually taken on one of them in respect of rent due for another (*i*). It also follows that where undivided shares of land are demised to tenants in common by separate demises, no property can be distrained upon for the rent due from any one of such tenants (at all events where such property is not clearly his own), because it is impossible to say that such property is on his land (*k*).

Exceptions.—*By express agreement*, however, between the parties a distress made elsewhere than on the lands included in the demise may be valid, at least as between themselves and as against parties taking by assignment and with notice (*l*). Where in a lease of mines power was reserved to the lessor to seize machinery in or

(*y*) 2 Inst. 131.

(*z*) *Lewis v. Read*, 13 M. & W. 834.

(*a*) See *Capel v. Bussard*, 6 Bing. at pp. 161—162.

(*b*) *Id.*, 6 Bing. 150.

(*c*) *Paton v. Carter*, C. & E. 183, Cave, J.

(*d*) Com. Dig. Distress (A.3); Bullen, Dist. 144; *ante*, p. 114.

(*e*) 1 Ro. Ab. 671.

(*f*) *Ante*, p. 492.

(*g*) *Rogers v. Birkmire*, Cas. temp. Hardw. 245; 2 Str. 1040.

(*h*) Bullen, Dist. 143.

(*i*) *Phillips v. Whilsed*, 2 E. & E. 804, per Cockburn, C. J.

(*k*) *Ex parte Parke*, L. R. 18 Eq. at p. 385, per Bacon, C. J. See *ante*, p. 493.

(*l*) *Daniel v. Stepney*, L. R. 9 Ex. 185.

upon any buildings or land, wherever the same might be used for the working of the mines, if rent were in arrear for thirty days after being legally demanded, it was held that the strict rules of the common law with regard to demands (*m*) need not be pursued in order that the right to distrain off the demised premises might be exercised (*n*). When mines which are demised are worked through and with other mines worked by the same lessees, it is not uncommon to find an express power to distrain for the rent upon such other property; and where in such a case the power to distrain was made to extend to goods "in or about any of the premises hereby demised or any adjoining or neighbouring collieries," it was held that on the true construction of the clause its operation was confined to the goods of the lessees in adjoining mines worked with the seam demised (*o*).

Moreover, the street or highway upon which the Statute of Marlebridge forbids a distress to be made apparently does not intend a *road immediately adjoining the demised premises* (though public): for the legal presumption that the soil of such a road belongs *usque ad medium filum* to the owner of such premises (*p*)—as it seems to apply to all leasehold interests (*q*)—will justify a distress upon the moiety of the road next to the premises, where the lands demised may be construed to extend to such *medium filum*, *e.g.*, from the description contained in the parcels of the lease (*r*), or from extrinsic evidence to the same effect (*s*). How far the circumstance that a street or road may vest by statute in a public authority (*e.g.*, under the Public Health Act) makes any difference does not seem altogether clear (*t*).

With regard specially to *cattle*, it is provided by statute (*u*) that "it shall and may be lawful to and for every lessor or landlord, lessors or landlords, or his, her, or their steward, bailiff, receiver, or other person or persons empowered by him, her, or them to take

(*m*) See p. 669, *post*.

(*n*) *Thorp v. Hurt*, W. N. 1886, p. 96.

(*o*) *In re Roundwood Colliery Co.*, [1897] 1 Ch. 373.

(*p*) *Berridge v. Ward*, 10 C. B. N. S. 400.

(*q*) See *Doe v. Pearsey*, 7 B. & C. 304. In *Landrock v. Met. Dist. Ry. Co.*, 3 T. L. R. 162, however, this point was left open in the C. A. The presumption applies in towns equally as in rural districts: *In re White's Charities*, [1898] 1 Ch. 659; *L. & N. W. Ry. Co. v. Westminster Corporation*, [1902] 1 Ch.

269 (the judgment was reversed on appeal on another point, [1904] 1 Ch. 759, but restored by the H. L. *sub nom. Westminster Corporation v. L. & N. W. Ry. Co.*, [1905] A. C. 426), and may be rebutted by the surrounding circumstances: *Mappin v. Liberty*, [1903] 1 Ch. 118.

(*r*) *Hodges v. Lawrance*, 18 J. P. 347.

(*s*) *Gillingham v. Gwyer*, 16 L. T. 640.

(*t*) See *Tunbridge Wells (Mayor of) v. Baird*, [1896] A. C. 434.

(*u*) 11 Geo. 2, c. 19, s. 8.

and seize as a distress for arrears of rent any cattle or stock of their respective tenant or tenants feeding or depasturing upon any common appendant or appurtenant or any ways belonging to all or any part of the premises demised or holden." And where the landlord enters on the demised premises to distrain upon cattle, he may follow and distrain upon them off the land (even in the highway), if the following conditions are fulfilled, viz. if he sees the cattle on the land, and they are then driven off the land, and they are so driven in order to prevent a distress; because in judgment of law the distress is then taken within his fee (*v*).

The most important exception, however, to the general principle is in the case of *fraudulent removal*. By stat. 11 Geo. 2, c. 19, it is enacted (*x*) that where a tenant "fraudulently or clandestinely" removes his goods from the demised premises for the purpose of preventing a distress, the landlord, or any person empowered by him, may within thirty days next after such removal seize the goods wherever they may be found as a distress for arrears of rent, provided (*y*) that they have not, before such seizure is made, been sold *bonâ fide* and for value to any person not privy to such fraud.

The words of the statute are as follows:—"In case any tenant or tenants, lessee or lessees, for life or lives, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise or holding whereof any rent is or shall be reserved due or made payable, shall fraudulently or clandestinely convey away or carry off or from such premises, his, her, or their goods or chattels, to prevent the landlord or lessor, landlords or lessors, from distraining the same for arrears of rent so reserved, due, or made payable, it shall and may be lawful to and for every landlord or lessor, landlords or lessors . . . or any person or persons by him, her, or them for that purpose lawfully empowered, within the space of thirty days next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels wherever the same shall be found as a distress for the said arrears of rent; and the same to sell or otherwise dispose of, in such manner as if the said goods and chattels had actually been distrained by such lessor or landlord, lessors or landlords, in and upon such premises for such arrears of rent" (*x*). But "no landlord or lessor, or other person entitled to

(*v*) Co. Lit. 161 a.(*x*) Sect. 1.(*y*) Sect. 2.

such arrears of rent, shall take or seize any such goods or chattels as a distress for the same, which shall be sold *bonâ fide* and for a valuable consideration, before such seizure made, to any person or persons not privy to such fraud as aforesaid" (z).

As to this enactment (a), the following observations apply:—

(a) The removal must be fraudulent or clandestine, *i.e.*, not necessarily secret, for it may be fraudulent though made openly and with the landlord's knowledge (b). The question of fraud is in all cases one of fact for a jury (b), the burden of proving it being on the landlord (c). The mere fact of removing the goods is not sufficient: it must be shown that the removal was made with the view to avoid a distress (d), though even proof (or an admission) of this is not conclusive, as the tenant may show that it was made in the *bonâ fide* belief that the landlord had no legal right to distrain (e). On the other hand, the mere fact of removing goods (not leaving enough to satisfy a distress) without paying the rent is evidence of fraud (f). The landlord is not bound, as a matter of course, to show that there was no sufficient distress on the premises (g). The fraud must be that of the tenant himself, or if the removal be by some other person—the actual participation of the tenant is not necessary if he be privy to the proceeding (h)—its object must have been to benefit *the tenant* (i); but on the other hand, it is not necessary that the party to whose premises the goods are removed should be privy to the fraud (k).

(b) The removal must be after the rent has fallen due. If made before the rent day the landlord cannot take advantage of the statute (l), but if made on the rent day he can do so, because the rent is due from the first moment of that day (m); and the fact that the rent is only *in arrear* on the following day makes no difference in this respect, though it entails the result that the distress (as in other cases) cannot be levied before that day (n). On

(z) Sect. 2.

(a) See further as to ss. 3—6, *post*, pp. 565—568, and as to sect. 7, *post*, p. 537.

(b) *Opperman v. Smith*, 4 D. & Ry. 33.

(c) *Inkop v. Morchurch*, 2 F. & F. 501.

(d) *Parry v. Dunoan*, 7 Bing. 243.

(e) *John v. Jenkins*, 1 Cr. & M. 227.

(f) *Opperman v. Smith*, *supra*.

(g) *Gillam v. Arkwright*, 16 L. T. (O. S.) 88; *Gegg v. Perrin*, 9 J. P. 619.

(h) *Lister v. Brown*, 3 D. & Ry. 501 (decided on sect. 8, *post*, p. 565).

(i) *Bach v. Meats*, 5 M. & S. 200 (decided on sect. 3, *post*, p. 565).

(k) *Williams v. Roberts*, 7 Exch. 618.

(l) *Watson v. Main*, 3 Esp. 15; *Rand v. Vaughan*, 1 Bing. N. C. 767.

(m) *Ante*, p. 119.

(n) *Dibble v. Bowater*, 2 E. & B. 564. Cf. p. 513, *supra*.

the other hand, it is not necessary to show that at the time of removal a distress was in contemplation by the landlord (*o*).

(*e*) The power of distress given by the statute only applies where the goods removed would have been distrainable if they had remained on the premises (*p*). Hence all the conditions rendering an ordinary distress valid must be fulfilled (*q*). Thus, if there be no demise at an ascertained rent (*r*), or if the landlord has parted with his reversion at the time of the distress (*s*) (and *a fortiori* at the time of the removal (*t*)), or if at the time of the distress the tenancy has come to an end and the possession given up by the tenant (*u*) (so that the stat. 8 Anne, c. 14, s. 6, does not apply (*x*)), the goods cannot be followed.

(*d*) The statute does not apply to goods which are not the property of the tenant at the time of the removal (*y*), *e.g.*, to goods which he has granted by a bill of sale (*z*), though it has been held to extend to the goods of a bankrupt tenant's assignees, where they had in fact adopted the demise and become tenants to the lessor (*a*). Hence the landlord, in order to justify a distress under the statute, must both plead and prove that the goods seized were the property of the tenant (*b*). If the tenant's property at the time of removal they are within the statute, and can only be afterwards protected from seizure if the subject of a *bonâ fide* sale under sect. 2, the burden of showing this being on the purchaser (*c*).

(*o*) *Stanley v. Wharton*, 10 Price, 138 (decided on sect. 3, *post*, p. 565).

(*p*) *Gray v. Slait*, 11 Q. B. Div. 668.

(*q*) *Ante*, pp. 477—486.

(*r*) See *Anderson v. Mid. Ry. Co.*, 3 E. & E. 614. Cf. *ante*, p. 482.

(*s*) See *Angell v. Harrison*, 17 L. J. Q. B. 25. Cf. *ante*, p. 484.

(*t*) *Ashmore v. Hardy*, 7 C. & P. 501.

(*u*) *Gray v. Slait*, *supra*.

(*x*) *Supra*, p. 514.

(*y*) *Thornton v. Adams*, 5 M. & S. 38; *Postman v. Harrell*, 6 C. & P. 225.

(*z*) *Tomlinson v. Consolidated Credit Corporation*, 24 Q. B. Div. 135 (decided under sect. 3, *post*, p. 565).

(*a*) *Welch v. Myers*, 4 Camp. 368.

(*b*) *Thornton v. Adams*, *supra*; *Fletcher v. Marriliter*, 9 A. & E. 457.

(*c*) *Williams v. Roberts*, 7 Exch. 618. As to sect. 2, see p. 519, *supra*.

CHAPTER V.

DISTRESS—FOR WHAT AMOUNT.

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THE amount recoverable by distress is ordinarily that of six years' rent (*a*), for it is provided by statute that no arrears of rent shall be recovered by distress but within six years next after the same shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent (*b*).

There are, however, three statutory *exceptions* to the general principle, contained respectively in the following enactments,—the Agricultural Holdings Act, the Bankruptcy Act, and the Companies Act.

I.—*Under the Agricultural Holdings Act.*

By 46 & 47 Vict. c. 61, it is enacted (*c*) that “it shall not be lawful for any landlord entitled to the rent of any holding to which this Act applies (*d*) to distrain for rent which became due in respect of such holding more than one year before the making of such distress . . . provided that where it appears that, according to the ordinary course of dealing between the landlord and tenant

(*a*) *Ex parte Bayly*, 22 L. J. Bkcy. 26.
 (*b*) 3 & 4 Will. 4, c. 27, s. 42. See available on a dispute arising under this section, see sect. 46, *post*, p. 581.
ante, p. 172.
 (*c*) Sect. 44. As to the procedure (d) See sects. 54, 61; *post*, pp. 723, 729.

of a holding, the payment of the rent of such holding has been allowed to be deferred until the expiration of a quarter of a year or half a year after the date at which such rent legally became due, then, for the purpose of this section, the rent of such holding shall be deemed to have become due at the expiration of such quarter or half year as aforesaid, as the case may be, and not at the date at which it legally became due."

This section, it is to be observed, does not provide that the landlord shall not distrain for more than a year's rent at a time, but only that he shall not distrain for rent that is more than twelve months overdue (*e*). And, as a matter of fact, in any case falling within the proviso, more than a year's rent (as it has been held) can be so recovered; for if the distress be levied while the quarter or half year is running, it will be available, not merely for the rent due on the last rent day (which has then become legally due), but also for rent legally due more than a year before the date of the distress, if it has only become payable according to the course of dealing within a year of that time (*f*). It will be noticed that the hypothetical time of accrual of the rent in the proviso is only "for the purpose of this section."

II.—Under the Bankruptcy Act.

By 46 & 47 Vict. c. 52, it is provided (*g*) that "the landlord or other person to whom any rent is due" from a bankrupt "may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation,—that if such distress be levied after the commencement of the bankruptcy, it shall be available only for" six months' rent (*h*) "accrued due prior to the date of the order of adjudication; but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the surplus due for which the distress may not have been available."

The term "order of adjudication" includes an order for the administration of the estate of a debtor whose debts do not exceed 50*l.*, or of a deceased person who dies insolvent (*g*);—*i.e.*, an order in the Court of Bankruptcy and not elsewhere (*i*).

(*e*) Per Cave, J., in next-cited case.

(*h*) 53 & 54 Vict. c. 71, s. 28.

(*f*) *Ex parte Bull*, 18 Q. B. D. 642;

Crosse v. Welch, 8 T. L. R. 401, 709.

(*i*) *In re Fryman's Estate*, 38 Ch. D. 468.

(*g*) Sect. 42.

The above provision applies to rent which falls due before the order of adjudication, though after the commencement of the bankruptcy (*k*) (i.e., after the commission of the act of bankruptcy on which the receiving order is made (*l*)), but not to rent which falls due afterwards (*m*); so that a distress may be made for such rent independently thereof, if possession be retained on behalf of the bankrupt, even though it be for rent payable in advance (*n*). It has, however, been held that, by virtue of the Apportionment Act, it can only be made available for an amount apportioned from the date of the order of adjudication to the time at which it accrues due (*o*). But inasmuch as the other portion of the rent of the quarter (or other period) is, as it has been held, rent which has "accrued due" within the meaning of sect. 42 (*p*), the effect is that where possession has been retained till the next ensuing quarter day the whole quarter's rent can be recovered (*q*), unless the landlord, by a previous distress levied after the commencement of the bankruptcy, has exhausted the rights conferred upon him by the clause now under discussion (*r*). No leave of the Court is necessary in the case of distress either for rent falling due after the order of adjudication (*n*), or for the six months' rent permitted by the Act (*s*).

The words "landlord or other person to whom any rent is due" denote the immediate landlord, and any person in the same position as a landlord who is entitled to distrain for rent properly so called (*t*), e.g., a mortgagee or receiver to whom an attornment has been made (*u*). They do not extend, for instance, to a gas company, though the charge for gas is often spoken of as "rent" (*x*), unless express power be given to the company to recover it in the same way as landlords may recover rent in arrear (*y*); and in that case (if the power be absolute (*z*)) a distress is not a "legal process"

(*k*) *Ex parte Dyke*, 22 Ch. Div. 410.

(*l*) 45 & 46 Vict. c. 52, s. 43.

(*m*) *Ex parte Hale*, 1 Ch. D. 285; *Briggs v. Sowry*, 8 M. & W. 729.

(*n*) *Ex parte Hale*, *supra*.

(*o*) *In re Wilson*, 62 L. J. Q. B. 628. See, however, *ante*, p. 124.

(*p*) It is, however, submitted that "accrued due" means "accrued due for the purpose of distress," i.e., payable, so that the above reasoning is excluded by force of sect. 3 of the Apportionment Act (33 & 34 Vict. c. 35): although the same result, if the observa-

tions at pp. 124, 125, *ante*, are well founded, is arrived at.

(*q*) *In re Howell*, [1895] 1 Q. B. 844.

(*r*) *In re Wilson*, *supra*.

(*s*) *Ex parte Till*, L. R. 16 Eq. 97.

(*t*) *Ex parte Harrison*, 13 Q. B. Div. 753, per Lindley, L. J.

(*u*) *Ex parte Hill*, 6 Ch. Div. 63, per Cotton, L. J.

(*x*) *Id.*

(*y*) *Ex parte Birmingham Gas Co.*, L. R. 11 Eq. 615; *Ex parte Harrison*, *supra*.

(*z*) *Ex parte Hill*, *supra*.

within sect. 10, sub-s. (2) of the Bankruptcy Act, which may be stayed by the Court (*a*).

Where, as is frequently the case in mortgage deeds, the relationship of landlord and tenant is created by attornment (*b*), the mortgagee acquires the rights given to a landlord by sect. 42 in the event of the tenant's bankruptcy. For this, however, the rent reserved by the attornment clause must be *bonâ fide* (*c*), and not so plainly excessive as to show that the object of the attornment was, not to create a real tenancy, but one to take effect only in the event of bankruptcy, and so defeat the operation of the bankruptcy law (*d*); but the fact that the rent is fluctuating in amount is not in itself material (*e*). Nor does it make any difference to the right of distress that the mortgagor has already attorned tenant to a prior mortgagee in respect of the same property (*f*).

The statute only applies to the "goods or effects of the bankrupt." Hence the goods of a stranger in which the tenant has no interest (*e.g.*, those of a mortgagee who has taken possession under the powers of his mortgage deed) are not protected, in the event of the tenant's bankruptcy, from the landlord's right of distress for the full period of six years' arrears (*g*); nor does the fact that the tenant obtains his discharge prevent the landlord from subsequently realizing such a distress, because the effect of the discharge is merely to release the bankrupt, and not to extinguish the debt (*h*).

In order to enforce his claim against the bankrupt's property the landlord must make an actual distress (*i*). And he cannot, of course, distrain and prove for the same rent (*k*).

When the levy of a distress is followed within three months by a receiving order against the tenant, the landlord's right to the proceeds is subject to the preferential claims for rates, taxes, wages, and salaries conferred by the statute 51 & 52 Vict. c. 62, already referred to (*l*). For that statute enacts (*m*) that "the debts to which

(a) *Ex parte Birmingham Gas Co.*, *supra*.

(b) *Ante*, p. 463. But see observation as to this on p. 464.

(c) *In re Stockton Iron Co.*, 10 Ch. Div. 335; *In re Threlfall*, 16 Ch. Div. 274.

(d) *Ex parte Williams*, 7 Ch. Div. 138; *Ex parte Jackson*, 14 Ch. Div. 725.

(e) *Ex parte Voisey*, 21 Ch. Div. 442. Cf. *ante*, p. 482.

(f) *Ex parte Punnett*, 16 Ch. Div. 226.

(g) *Brookhurst v. Lawce*, 7 E. & B.

176 (followed in *Railton v. Wood*, 15 App. Ca. 363); *Crosse v. Welch*, 8 T. L. R. 401, 709.

(h) *Newton v. Scott*, 9 M. & W. 434; *affd.*, 10 M. & W. 471. See Bankruptcy Act (46 & 47 Vict. c. 52), s. 30.

(i) *Gethin v. Wilks*, 2 Dowl. 189. Cf. *In re Suffield*, 20 Q. B. Div. 693.

(k) *Ex parte Grove*, 1 Atk. 104; *Wms. Bkcy.* 175 (8th ed.).

(l) *Ante*, p. 201.

(m) Sect. 1, sub-s. 4.

priority is given by this section shall be a first charge on the goods or effects so distrained on or the proceeds of the sale thereof; provided that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom such payment is made" (*n*). Where a distress is levied or threatened upon bankruptcy, it is not unusual for the trustee, in order to obtain a stay of the proceedings, to give an undertaking for payment of rent to the landlord, subject only to preferential claims arising under the above statute; and where such an undertaking was to the effect that, in the event of realizing such of the goods of the debtor as were liable to distress, or any part of them, the trustee would treat the amount for which the landlord was entitled to distrain as a first charge "on the net proceeds" of any realization of such goods (subject only to the claims before mentioned), it was held that the landlord's claim to payment of rent and costs must be satisfied out of such proceeds next after those claims, and before deducting any sum for the costs of administering the estate (*o*).

Moreover, in the case of a distress before bankruptcy, the landlord may lose its benefit if after distraining goods he allows them to remain on the premises so as to be in the reputed ownership of the bankrupt at the commencement of the bankruptcy (*p*).

It may be mentioned here that payment of rent to the landlord after an act of bankruptcy, whether under a threat of distress (*q*) or to avoid the possibility of re-entry (*r*), will not be impeached as a fraudulent preference on the part of the tenant within the Bankruptcy Act. The principle is that if a person has a right in the nature of a lien against a bankrupt's estate, and after the commencement of the bankruptcy he enforces his lien as he is entitled to do, and payment is made to him by the bankrupt out of money or property which by reason of the bankruptcy supervening turns out not to have been his, the payment is valid to the extent to which the estate has been benefited (*s*). But this cannot justify a payment out of the bankrupt's estate of a larger amount than that of the lien (*s*). Consequently, where the landlord of a farm, after the commencement of his tenant's bankruptcy, entered into an

(*n*) The Act also applies to a company which is being wound up and to a person who dies insolvent. See *ante*, p. 201.

(*o*) *In re Chapman*, 10 T. L. R. 449.

(*p*) *Ex parte Shuttleworth*, 1 D. & C. 223. Nor can he distrain the goods a

second time for the same rent: see *post*, p. 562.

(*q*) *Stevenson v. Wood*, 5 Esp. 200.

(*r*) *Mavor v. Croome*, 1 Bing. 261.

(*s*) Per Vaughan Williams, J., in next case.

agreement to refrain from levying a distress for arrears of rent in consideration of being allowed to take over at a valuation certain stock in lieu thereof, it was held that to the extent to which such valuation exceeded the six months' rent to which his lien was confined the agreement was invalid (*t*).

III.—*Under the Companies Act.*

The Companies Act, 1862 (25 & 26 Vict. c. 89), in terms provides (*u*) that any distress put in force against the effects of a company which is being wound up by the Court or subject to its supervision, after the commencement of the winding-up, shall be void to all intents. Yet it has been decided—and though the propriety of the decision is open to serious doubt, it has been followed too long to be now called in question (*x*)—that this section is to be read with and controlled by sect. 87; that a distress is a “proceeding” within this latter section; that sect. 163 only avoids distresses made without leave; and that a distress may consequently be levied after a winding-up has commenced, subject to the leave and discretion of the Court (*y*). Such leave is always necessary, and the Judicature Act, 1875, s. 10 (which assimilates the rules in winding-up to those in bankruptcy), does not extend the provision of the Bankruptcy Act, enabling a landlord to distrain for a year's (now six months') rent in arrear as a matter of course (*z*), to the case where the tenant is a company in liquidation (*a*).

With regard to distresses which have been already levied, though not completed by sale, at the commencement of the winding-up, the principle seems to be that the Court has power to restrain them, but that it will not do so in the absence of special reasons rendering it inequitable for the landlord to enforce his rights (*b*).

In the case of a voluntary winding-up, the liquidator is enabled (*c*) to apply to the Court to exercise the same powers in all matters—and therefore in respect of controlling a distress—as the Court might exercise where the winding-up is compulsory (*b*).

Sect. 163, however, only applies to distresses made upon “effects

(*t*) *In re Griffith*, 66 L. J. Q. B. 763.

(*u*) Sect. 163.

(*x*) *In re Lancashire Cotton Co.*, 35 Ch. Div. 656.

(*y*) *In re Ezhall Coal Co.*, 4 D. J. & S. 377.

(*z*) *Supra*, p. 523.

(*a*) *In re Coal Consumers' Association*, 4 Ch. D. 625; *Thomas v. Patent Lionite Co.*, 17 Ch. Div. 250.

(*b*) *In re Roundwood Colliery Co.*, [1897] 1 Ch. 373, per Stirling, J. The decision was reversed in the C. A. on another point.

(*c*) 25 & 26 Vict. c. 89, s. 138.

of the company" (d), and these words do not include property belonging to a company, but subject to a charge which exhausts its whole value (e). Hence, where a company goes into liquidation, the landlord may exercise the right of distress upon goods which, though originally belonging to the company, have been charged for more than their full value in favour of debenture-holders; and this even though the latter may have offered to release their security (f). Nor does it make any difference that no receiver has been appointed on their behalf (g).

As to the principles upon which leave to distrain will be given,—and they apply equally in the case of a voluntary winding-up (h)—there are two classes of cases:—

A. Where the landlord has a right of proof for the rent.

In these cases the landlord must show either that it is inequitable for the company to insist upon sect. 163, or that the rent ought to be paid in full as one of the expenses of the winding-up (i).

(a) Rent due *before* commencement of the winding-up.—Leave will not be given to distrain for such rent (k), even if the liquidator retain possession afterwards for the purposes of the winding-up (l).

(b) Rent due *after* commencement of the winding-up.—Leave to distrain will be given in this case—even for rent payable in advance (m)—if the liquidator has retained possession for the purpose of the winding-up, or if he has used the property for carrying on the company's business, or has kept the property in order to sell it or do the best he can with it (n); for under these circumstances the rent is considered as one of the expenses of the winding-up (o). So placing a caretaker on the property in the

(d) *In re Regent, &c., Stores*, 8 Ch. Div. 616. Cf. p. 525, *supra*, at note (g).

(e) Per Cotton, L. J., in next-cited case.

(f) *In re New City Club Co.*, 34 Ch. Div. 646.

(g) *In re Harpur's Cycle Fittings Co.*, [1900] 2 Ch. 781.

(h) *Shackell v. Chorlton*, [1895] 1 Ch. 378. See at note (c), *supra*.

(i) *In re Lancashire Cotton Co.*, *supra*.

(k) *In re Traders' North Staffordshire Co.*, L. R. 19 Eq. 60; *In re Coal Consumers' Association*, *supra*; *Thomas v. Patent Lionite Co.*, *supra*.

(l) *In re North Yorkshire Iron Co.*, 7 Ch. D. 661; *In re Brown*, 18 Ch. D. 649.

(m) *Shackell v. Chorlton*, *supra*. But only for an amount to cover the time during which the beneficial occupation (see *infra*) of the liquidator may continue.

(n) *In re Oak Pits Colliery Co.*, 21 Ch. Div. 322, per Lindley, L. J. (where the cases are collected); *Cumberland Banking Co. v. Maryport Hematite, &c., Co.*, [1892] 1 Ch. 415.

(o) Lindley on Companies, p. 916 (6th ed.).

hope of obtaining a better price for it by waiting, and with a view to preventing it from suffering damage, but not to carrying on business or selling it as a going concern, is sufficient (*p*). But mere abstention by the liquidator from endeavours to get rid of the property will not entitle the landlord to the necessary leave (*q*); and if the retention be for the benefit of the landlord as well as of the company (*r*) (and there is no agreement by the liquidator to pay rent (*s*)), it will not be given (*t*). Nor will it be given by reason of the mere fact that the liquidator, without adopting the contract of tenancy or using the property for the beneficial winding-up, has derived from it an indirect advantage (*u*). On the other hand, the fact that the landlord has a right of re-entry which he fails to enforce is not in itself a reason for refusing such leave (*x*).

Leave to distrain is as a rule limited to so much of the rent due as is apportioned to the time which has elapsed since the commencement of the winding-up (*y*): for the Apportionment Act, 1870 (*z*), enables the landlord to prove for the earlier portion. But where the lessor is entitled to re-enter and claims to exercise that right unless paid in full, the liquidator, if he continue in possession, will be ordered to pay the full rent due without apportionment (*a*).

Where a company in liquidation held mines under a lease which provided that the lessors at the determination of the term should have the option of purchasing certain plant at a valuation, and the lessors, under an order to that effect, distrained for rent due since the liquidation and re-entered, it was held (on a claim to exercise such option) that, though entitled to deduct from the amount due to the liquidator in respect of the plant any rent accrued since the liquidation, they were not entitled to deduct damages in respect of continuing breaches of covenant as to working the mines (even though such covenants were an

(*p*) *In re Blaser Fire Lighter, Limited*, [1895] 1 Ch. 402, per Vaughan Williams, J.: a case of distress for rates, but the principle (see the judgment) is the same. The earlier cases as to leave to distrain for rates will be found there discussed.

(*q*) *In re Oak Pits Colliery Co.*, *supra*.

(*r*) *In re Progress Assurance Co.*, L. R. 9 Eq. 370; *In re Bridgewater Engineering Co.*, 12 Ch. D. 181.

(*s*) *In re Oak Pits Colliery Co.*, *supra*, per Lindley, L. J.

(*t*) Compare *In re Higginshaw Mills Co.*, [1896] 2 Ch. 544, a case of distress by a mortgagee for interest.

(*u*) *In re House and Land Investment Trust*, 42 W. R. 572.

(*x*) *In re North Yorkshire Iron Co.*, *supra*.

(*y*) *In re South Kensington Stores*, 17 Ch. D. 161; *Shackell v. Chorlton*, [1895] 1 Ch. 378.

(*z*) 33 & 34 Vict. c. 35; *ante*, p. 121.

(*a*) *In re Silkstone Coal Co.*, 17 Ch. D. 158.

equivalent for increased rent (*b*)), inasmuch as such damages could not be distrained for (*c*).

B. Where the landlord has no right of proof for the rent.

The sections of the Companies Act now considered only apply where the landlord is a creditor of the company (*d*), *i.e.*, where the company is the legal tenant of the person seeking leave to distrain (*e*). Where the relationship of landlord and tenant does not exist between him and the company (*f*), *e.g.*, where the company is only the sub-tenant (*g*), or the *cestui que trust* (*h*), or the equitable assignee (*i*), of his own tenant, or where the company has merely goods of its own on the demised premises (*k*),—in all these cases the landlord has no right of proof for his rent against the company at all, and the Court will consequently not interfere with his legal right of distress. For his right of distress is against the legal tenant who is responsible for the rent, and if he finds goods on the land he is entitled to distrain upon them none the less because they happen to be goods of the company (*l*). Nor does it make any difference that the company may have offered to allow him to prove in the winding-up (*m*). But if he have accepted from them a security for the rent which is either collateral or in provisional satisfaction of his claim, and upon which he can prove, it seems clearly the better opinion that distress will be restrained (*n*).

In cases of this class, where the company is not tenant to the person distraining, it is immaterial whether the rent for which distress is sought to be put in force accrued due before or after the commencement of the winding-up (*o*).

(*b*) It is presumed that the fixed rent payable was liable to increase by reason of royalties upon getting produce in accordance with the covenants to work the mines: see *ante*, pp. 115, 296.

(*c*) *In re Kidsgrove Steel Co.*, W. N. 1894, p. 25.

(*d*) *In re Lundy Granite Co.*, L. R. 6 Ch. 462; *In re Regent, &c., Stores*, 8 Ch. Div. 616.

(*e*) Lindley, p. 914.

(*f*) *In re Regent, &c., Stores*, *supra*.

(*g*) *Ex parte Clemence*, 23 Ch. D. 154 (reported as *Re Carriage, &c., Association, Limited*, 48 L. T. 308).

(*h*) *In re Exhall Coal Co.*, 4 D. J. & S. 377.

(*i*) *In re Lundy Granite Co.*, *supra*.

(*k*) *In re Traders' North Staffordshire Co.*, L. R. 19 Eq. at p. 66, per Jessel, M. B.

(*l*) Buckley, Comp. Acts, 280 (8th ed.).

(*m*) *In re Regent, &c., Stores*, *supra*.

(*n*) *In re Harpur's Cycle Fittings Co.*, [1900] 2 Ch. 731. *In Ex parte Clemence*, *supra*, it had been decided otherwise, but this decision has been doubted (see *In re New City Club Co.*, 34 Ch. Div. 646), and, according to Lindley (Companies, p. 915), with reason.

(*o*) Lindley, *ubi sup*.

CHAPTER VI.

DISTRESS—HOW LEVIED.

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Appointment of bailiff.—Formerly a distress for rent might have been levied by the person to whom the rent was due, or by any other person acting as bailiff or agent authorized by him to make the levy. But now, by the Law of Distress Amendment Act, 1888 (*a*), “no person shall act as bailiff to levy any distress for rent unless he shall be authorized to act as a bailiff by a certificate in writing”—which must, on the tenant’s request, be produced to him (*b*)—“under the hand of a County Court judge”; and “if any person not holding a certificate under this section shall levy a distress contrary to the provisions of this Act, the person so levying” (who now, by force of a further provision (*c*), “shall, without prejudice to any civil liability, be liable on summary conviction to a fine not exceeding ten pounds”), “and any person who has authorized him so to levy, shall be deemed to have committed a trespass” (*d*). The statute, it will be observed, merely forbids an uncertificated person to act *as a bailiff*, and therefore presumably does not interfere with the landlord’s right of distraining in person (*e*). With the exception, however, of cases

(*a*) 51 & 52 Vict. 21, s. 7.

(*b*) Distress for Rent Rules, 1888 (made pursuant to sect. 8 of the Act), r. 18.

(*c*) 58 & 59 Vict. c. 24, s. 2. As to

the right of the accused to give evidence on such proceeding, see sect. 5.

(*d*) 51 & 52 Vict. c. 21, s. 7.

(*e*) See judgments of C. A. in next-cited case.

where the power of distress is conferred upon special classes of persons by statute (*e.g.*, on an executor (*f*), or on a tenant *pur auter vie* (*g*)), no distress can be levied by any person—the managing director of a company, for example—other than the legal owner of the reversion, unless such person has been duly appointed under the Act (*h*). The protection, it may be observed, afforded by the enactment under discussion is not confined to cases between the landlord and his tenant, but enures for the benefit of third parties whose goods are on the demised premises (*i*).

A certificate under the Act may be general or special, *i.e.*, applying to a particular distress or distresses only (*k*). A general certificate, which authorizes the bailiff named in it to levy at any place in England or Wales (*l*), must be obtained from the judge of a County Court (*i.e.*, of any County Court (*m*)) in person, the applicant satisfying the judge that he is resident or has his principal place of business in the district of the Court, and stating whether he has ever been refused a certificate or had a former certificate cancelled (*n*); whereas a special certificate may be granted by the registrar as well as the judge (*o*). With the qualification that no officer of a County Court (appointed after Aug. 31st, 1888 (*p*)) may have a certificate granted to him (*q*), any practising solicitor (*r*), and any other person on giving proof of his fitness to act (*s*), may, on payment of the prescribed fee (*t*), obtain either a general or a special certificate. A general certificate shall (unless previously determined) have effect (*u*) until the 1st of February next after the expiration of twelve months from the granting thereof, provided that the judge of the Court where the certificate was granted may renew (*x*) the same from time to time for the like period (*y*). A

(*f*) *Ante*, p. 489. *I.e.*, in the case of freeholds, for the reversion in leaseholds (*ante*, p. 441) always vests in him.

(*g*) Under 32 Hen. 8, c. 37, s. 4.

(*h*) *Hogarth v. Jennings*, [1892] 1 Q. B. 907.

(*i*) *Perring v. Emerson*, [1906] 1 K. B. 1.

(*k*) 51 & 52 Vict. c. 21, s. 7. See Forms in Dist. for Rent Rules, 1888, App. I.

(*l*) Dist. for Rent Rules, 1888, r. 4.

(*m*) See *In re Sanders*, 54 L. J. Q. B. 331.

(*n*) Dist. for Rent Rules, 1895, r. 1, made under 58 & 59 Vict. c. 24, s. 3.

(*o*) Dist. for Rent Rules, 1888, r. 3.

(*p*) Rule of December 7th, 1888.

(*q*) Dist. for Rent Rules, 1888, r. 6.

(*r*) *Id.*, r. 7.

(*s*) *Id.*, r. 8. As to the security that may be required, see rr. 9—14. These rules provide for dealing with the security on applications to cancel or make void (Dist. for Rent Rules, 1895, r. 7) a certificate.

(*t*) 5s. in the case of a general, and 2s. 6d. in the case of a special, certificate.

(*u*) Dist. for Rent Rules, 1895, r. 2.

(*x*) As to security on renewal, see Dist. for Rent Rules, 1895, r. 4, and as to form of renewed certificate, *id.*, r. 5. The fee on application for renewal is 2s. 6d.

(*y*) The above rule applies to every certificate granted before the passing of these rules (29th Nov. 1895) as if it had been granted at the date of the commencement of the Act next cited (6th July, 1895; Rule of 26th March, 1896).

certificate granted to a bailiff by the judge of a County Court under the Act may at any time be cancelled or declared void by a judge of that County Court (*z*); and if guilty of extortion or misconduct, he is not exempted from any other penalty or proceeding to which he may be liable (*a*). The certificate, however, will be effectual, notwithstanding cancellation or expiration by non-renewal, for the purpose of any distress, where the bailiff has entered into possession before the date of cancellation or expiration (*b*).

The effect of the above statute is thus seen to be that of narrowing the selection of bailiff to persons of a particular kind; but inasmuch as the landlord still retains the right of selection within the prescribed limits, it is conceived that the statute does not make the bailiff a mere officer of the Court, so as to relieve the landlord of liability in respect of those of the bailiff's acts (*c*) for which before the statute he would have been liable (*d*).

A bailiff, who may be appointed by any person entitled to distrain (*e*), should properly have an authority in writing, called a distress-warrant, from his employer (*f*). But this authority is not strictly necessary (even apparently in the case of an appointment by a corporation aggregate (*g*)), as a distress made without it may be afterwards ratified (*h*), and such ratification will relate back to the time the distress is made (*i*). Thus a distress made by a bailiff whose authority has been determined by the death of the person in whose name it is levied may be afterwards ratified by the executor, even though it has been levied before he has obtained probate (*i*). And such ratification may even be implied from the employer's subsequent acts (*k*), as where he retains a solicitor to defend the bailiff in an action brought against him by the tenant in respect of the distress (*l*).

It does not seem altogether clear how far a distress-warrant requires a stamp. As a mere "ratification of an authority to distrain" it possibly does not (*m*). But where, as usually happens,

(*z*) 58 & 59 Vict. c. 24, s. 1. As to form of cancellation, see Dist. for Rent Rules, 1895, r. 8, and as to notification thereof, *id.*, r. 6.

(*a*) 51 & 52 Vict. c. 21, s. 7. For an instance of such penalty, see *infra*, p. 553.

(*b*) Dist. for Rent Rules, 1895, r. 3.

(*c*) As to this, see pp. 573, 578, 579, *post*.

(*d*) Cp. *Martin v. Temperley*, 4 Q. B. 298.

(*e*) See this discussed, *ante*, pp. 487—492.

(*f*) Bullen, Dist. 150, where a form is given.

(*g*) *Cary v. Matthews*, 1 Salk. 191, n.

(*h*) *Trevillian v. Pine*, 11 Mod. 112; notes to *Potter v. North*, 1 Wms. Saund. 640 (ed. 1871).

(*i*) *Whitehead v. Taylor*, 10 A. & E. 210.

(*k*) See *Toptis v. Grane*, 5 Bing. N. C. 636.

(*l*) *Duncan v. Meikleham*, 3 C. & P. 172.

(*m*) See *Pyle v. Partridge*, 15 M. & W. 20, per Pollock, C. B.

it contains an express clause of indemnity to the bailiff (*n*), it would appear that, unless the subject-matter of the distress is below 5*l.* in value, an agreement stamp is now necessary (*o*); though under the former stamp laws, where value was an essential condition of the charge and not of the exemption, it was held that such an indemnity did not require a stamp, as not being *necessarily* of the stipulated value (*p*). Whether, having regard to the fact that if the rent remain unpaid the goods are usually sold under the warrant after their seizure, it may be looked upon as a memorandum "for or relating to the sale" of goods within the meaning of a further exemption in the Stamp Act (*o*), seems doubtful, although it may be observed that such exemption, on the ground of its manifest intention to benefit trade, has often received a liberal construction from the Courts.

The authority of a bailiff may be withdrawn at any time before the goods distrained are actually sold (*q*). As between the bailiff and his employer, the effect of a warrant of distress is to indemnify the former so far as a warranty is to be implied on the part of the latter that he had the right to put in such distress (*r*); and the bailiff may consequently recover the reasonable damages and costs of defending an action brought against him on the ground that such right did not exist (*s*). But it will not as a rule indemnify him against the consequences of any acts committed by him or his servants in the course of the distress (*t*), even though it be expressed to cover all costs and charges incurred *on account of* the distress (*t*). It may, however, be so worded as to apply to all actions arising out of the distress to which he may be subjected, except for the actual misconduct or default of himself or his servants (*u*). And even where he has acted wrongfully, its effect may still be to indemnify him against the particular illegality he may have committed; thus a warrant directing a distress to be made of the "several goods and chattels on the premises" of an auctioneer was held to indemnify the bailiff against the consequences of seizing goods privileged from distress, where the circumstances

(*n*) See next paragraph.

(*o*) 54 & 55 Vict. c. 39, 1st sched.

(*p*) *Cox v. Bailey*, 6 M. & Gr. 193.

(*q*) See *Harding v. Hall*, 14 L. T. 410.

(*r*) *Draper v. Thompson*, 4 C. & P. 84, per Tindal, C. J. The writ in an action on such indemnity may be indorsed as follows: "The plaintiff's claim is for damages for breach of a contract to

indemnify the plaintiff as the defendant's agent to distrain": *R. S. C.* 1883, App. A., Pt. III. a. 4.

(*s*) See *Cox v. Bailey*, 6 M. & Gr. 193; and cp. *Preston v. Peeke*, E. B. & E. 336.

(*t*) *Draper v. Thompson*, *supra*.

(*u*) *Ibbett v. De la Salle*, 6 H. & N. 233.

showed that the employer, by his conduct throughout the whole transaction, caused the bailiff to believe that he was acting under an indemnity from him (*x*).

If on the other hand the bailiff in the course of his employment commit some act which renders his employer liable to the tenant, the employer will, on paying the tenant, be entitled to recover the amount from the bailiff (*y*). So a bailiff may become liable to his employer for the full value of the goods distrained, if they be lost owing to his failure to use reasonable care (*z*).

Entry.—Entry for the purpose of distress must be obtained at a lawful time (*a*) and in a lawful manner (*b*), otherwise the distress will be bad *ab initio* (*c*). And a wrongful entry made by a third person under the direction of the distrainer will make the distress equally unlawful if it be the means of enabling the distrainer to enter, though the entry by the latter may have been itself effected in a lawful manner (*d*).

Entry for the purpose of a distress will be good in all cases where admission can be obtained to the demised premises without a trespass being committed (*e*): *e.g.*, where the landlord and tenant are tenants in common of a partition which is removed for the purpose of entry without injury to the tenant's premises, for one tenant in common cannot under such circumstances bring trespass against another (*f*). In ordinary cases the landlord cannot "break open the gates or break down the enclosures" (*g*) of the demised premises to levy a distress; so that while it seems probable that he cannot break a door in the wall of a surrounding courtyard (*h*), it is clear that the outer door of the tenant's house cannot be broken open (*i*), nor the door of a barn, stable, warehouse, or other building, whether within the curtilage of the dwelling-house (*k*) or not (*l*). And the fact that a door which is broken open is not an outer enclosure of the whole demised premises makes no difference if it be the outer door of a disconnected building which forms part of them; so that a distress so levied in such building will be

(*x*) *Toplis v. Grane*, 5 Bing. N. C. 636.

(*y*) *Megson v. Mapleton*, 49 L. T. 744.

(*z*) *White v. Heywood*, 5 T. L. R. 115.

(*a*) *Ante*, p. 516.

(*b*) Cases under this head, *passim*.

(*c*) *Attack v. Bramwell*, 3 B. & S. 520; *post*, pp. 572—576.

(*d*) *Nash v. Lucas*, L. R. 2 Q. B. 590.
Cp. *Budd v. Pyle*, 10 J. P. 203.

(*e*) *Bullen, Dist. 154.*

(*f*) *Gould v. Bradstock*, 4 Taunt. 562, per Mansfield, C. J.

(*g*) Co. Lit. 161 a.

(*h*) Per Kay, L. J., in next-cited case.

(*i*) *Bullen, Dist. 154.* As to inner doors, see *infra*, p. 538.

(*k*) *Long v. Clarke*, [1894] 1 Q. B. 119, per Lord Esher, M. R.

(*l*) *Brown v. Glenn*, 16 Q. B. 254.

illegal, even though primary access to the demised premises was obtained lawfully (*m*).

But the latch may be lifted, or even a movable staple withdrawn, *if this be the usual mode of entry*—so as to justify the inference that the door was thus secured in order to keep it closed and not for the purpose of keeping persons out (*n*),—for a licence to enter is implied from a door being left unfastened although closed (*o*). It has been laid down that the landlord has authority by law to open the door in the ordinary way in which other persons can do it “when it is left so as to be accessible to all who have occasion to go into the premises” (*p*). A window, on the other hand, not providing the usual mode of access to premises, breaking open a window (*q*), or undoing the hasp (*r*), or even opening a closed but unfastened window (*s*), makes the entry unlawful; although entry by an open window is valid (*t*), even when it has to be further opened for admission to be obtained (*u*). And the same principle applies to a skylight (*x*). The mere fact that entry is obtained by getting over a fence or wall from adjoining premises will not make a distress unlawful (*y*), inasmuch as a person coming to distrain may commit in so doing an act which in other persons would be a trespass, so long as he does not break down the enclosures or break open an outer door (*z*).

There are, however, two cases where force may be used in effecting an entry to distrain. First, where the distrainor has been forcibly expelled by the tenant after he has lawfully gained possession (*a*)—*i.e.*, complete possession, for merely getting a foot between the door and the lintel, or inserting an article to prevent the door from being closed, will not be sufficient (*b*),—or where he leaves the premises, even for a purpose not strictly necessary, and on his return is refused re-admission (*c*). But in both these instances it must appear that there was no *abandonment* of the

(*m*) *American, &c., Must Corporation v. Hendry*, 62 L. J. Q. B. 388.

(*n*) *Ryan v. Shilcock*, 7 Exch. 72.

(*o*) *Nash v. Lucas*, L. R. 2 Q. B. 590, per Lush, J.

(*p*) *Ryan v. Shilcock*, *supra*. Turning a key in the door, or drawing back a bolt, might, it would seem, be capable of justification on this ground.

(*q*) *Attack v. Bramwell*, 3 B. & S. 520.

(*r*) *Hancock v. Austin*, 14 C. B. N. S. 634.

(*s*) *Nash v. Lucas*, *supra*.

(*t*) *Nixon v. Freeman*, 5 H. & N. 632; *Long v. Clarke*, [1894] 1 Q. B. 119.

(*u*) *Crabtree v. Robinson*, 15 Q. B. D. 312.

(*x*) *Müller v. Tebb*, 9 T. L. R. 515.

(*y*) *Eldridge v. Stacey*, 15 C. B. N. S. 458.

(*z*) *Long v. Clarke*, *supra*, overruling *Scott v. Buckley*, 16 L. T. 573.

(*a*) *Eagleton v. Gutteridge*, 11 M. & W. 465; *Eldridge v. Stacey*, *supra*.

(*b*) *Boyd v. Profaze*, 16 L. T. 431.

(*c*) *Bannister v. Hyde*, 2 E. & E. 627.

distress (*d*), the question of abandonment being one of fact (*e*), and in the latter instance equivalent to the question whether the person distraining intended to return (*f*): for quitting the premises without leaving any one in possession does not necessarily amount to abandonment (*g*). Similarly, where the owner of goods which have been distrained is permitted to remove them for a temporary purpose, with the intention that they shall be returned (which is done), there is no abandonment (*h*).

Next, in the case of fraudulent removal. By the statute 11 Geo. 2, c. 19, it is provided (*i*), that "where any goods or chattels fraudulently or clandestinely conveyed or carried away by any tenant or tenants, lessee or lessees, his, her, or their servant or servants, agent or agents, or other person or persons aiding or assisting therein, shall be put, placed, or kept in any house, barn, stable, outhouse, yard, close, or place, locked up, fastened, or otherwise secured, so as to prevent such goods or chattels from being taken and seized as a distress for arrears of rent, it shall and may be lawful for the landlord or landlords, lessor or lessors, his, her, or their steward, bailiff, receiver, or other person or persons empowered to take and seize as a distress for rent such goods and chattels (first calling to his, her, or their assistance the constable, headborough, borsholder, or other peace officer (*k*) of the hundred, borough, parish, district, or place, where the same shall be suspected to be concealed, who are hereby required to aid and assist therein, and, in case of a dwelling-house, oath being also first made before some justice of the peace of a reasonable ground to suspect that such goods or chattels are therein), in the day-time to break open and enter into such house, barn, stable, outhouse, yard, close, and place, and to take and seize such goods and chattels for the said arrears of rent, as he, she, or they might have done by virtue of this or any former Act, if such goods and chattels had been put in any open field or place."

The question of what is a fraudulent removal, and what conditions must be fulfilled for the statute to apply, has already been discussed (*l*); and here it will suffice to say that to justify a breaking

(*d*) See *Russell v. Rider*, 6 C. & P. 416.

(*e*) *Eldridge v. Stacey*, *supra*.

(*f*) *Bonnister v. Hyde*, *supra*, per Blackburn, J.

(*g*) *Swann v. Lord Falmouth*, 8 B. & C. 456; *Jones v. Biernstein*, [1899] 1 Q. B. 470; *affd.*, C. A., [1900] 1 Q. B. 100. Cf. *Lumden v. Burnett*, [1898] 2 Q. B. 177 (a distress for taxes).

(*h*) *Kerby v. Harding*, 6 Exch. 234.

(*i*) Sect. 7.

(*k*) In ordinary cases the presence of a constable at a distress is not justifiable by the landlord, unless it appears to have been necessary either from threats of resistance or the apprehension of violence: *Skidmore v. Booth*, 6 C. & P. 777.

(*l*) *Ante*, pp. 519—521.

within the above section, the landlord must comply strictly with its provisions (*m*). Thus he must show, and should allege in his pleading, that it took place in the presence of a constable,—and this in every case, and not merely where the goods are “concealed” (*n*); but the presence of a special constable appointed by a warrant for the particular occasion is sufficient for this purpose (*o*).

It may be added that, in order to prevent fraudulent removal of goods to escape from distress, power is given, in the metropolitan police district (*p*), to any constable to stop and detain, until due inquiry can be made, all carts and carriages which he shall find employed in removing the furniture of any house or lodging between the hours of 8 p.m. and 6 a.m., or whenever he shall have good grounds for believing that such removal is made for the purpose of evading the payment of rent (*q*).

Seizure.—The prohibition against breaking the doors of demised premises applies only to outer doors. Subject to what has already been said (*r*), once entry has been lawfully obtained, the distrainer may always justify breaking open an inner door or lock to find any goods which are distrainable (*s*). This, however, is not as a rule necessary, inasmuch as a seizure of some goods on the premises in the name of all will be good as a seizure of all (*t*).

As between landlord and tenant an actual seizure is not necessary, for a seizure may be constructive:—*e.g.*, where a bailiff who had entered and pressed for rent alleged to be due and the expenses of the levy received payment of them under protest, and thereupon withdrew without having touched any of the tenant’s goods or made an inventory (*u*), or where he entered the demised premises, and after intimating his intention to distrain, walked round the premises (without, however, touching any goods or leaving any person in possession), and afterwards gave the tenant a notice (*x*) that he had distrained (*y*). But a mere intention to distrain not carried into effect is not sufficient (*z*).

(*m*) See judgments in next-cited case.
 (*n*) *Rich v. Woolley*, 7 Bing. 651.
 (*o*) *Cartwright v. Smith*, 1 Moo. & R. 284.
 (*p*) Defined in 10 Geo. 4, c. 44, s. 4 (and sched.), as amended by sect. 2 of next-cited Act.
 (*q*) 2 & 3 Vict. c. 47, s. 67.
 (*r*) See *supra*, at note (*m*), p. 536.
 (*s*) *Browning v. Dann*, Bull. N. P. 81.
 (*t*) *Dod v. Monger*, 6 Mod. 215.

(*u*) *Hutchins v. Scott*, 2 M. & W. 809; as to the inventory, see p. 548, *infra*.
 (*x*) As to this, see pp. 547, 548, *infra*.
 (*y*) *Swann v. Lord Falmouth*, 8 B. & C. 456.
 (*z*) *Spice v. Webb*, 2 Jur. 943, where the bailiff entered and began an inventory, but finding he had made a mistake left without removing any of the goods.

As between landlord and third persons, too, the same rule holds good; for though no action will lie by the former against the latter for removing goods which have not, as a matter of fact, been seized (*a*), a seizure will be valid if actual, as by laying hands on an article and claiming to detain it till the rent is satisfied (*b*), and equally so if merely constructive (*c*), for it is enough if the landlord take means to prevent the removal of the goods *on the ground of rent being in arrear*, whether such means be effectual (*d*) or not (*e*). Thus a letter from the landlord's solicitor to a man in possession of the tenant's goods under a bill of sale, claiming them for rent due, followed by efforts on the landlord's part to prevent their removal, is a sufficient seizure so as to render such removal unlawful; nor (as it has—it is thought incorrectly—been held) (*f*) does it even make any difference that such distress as between landlord and tenant is illegal by reason of its having taken place after sunset, for the tenant can waive such illegality, so as to prevent third persons from taking advantage of it (*g*). But the mere act of preventing the removal of goods in such a case with the intention of subsequently distraining them, though it may, if done at a time when distress would be illegal, subject the landlord to an action of trespass (*h*), will not render him liable to an action of trover at the instance of their owner, for this action only lies when he has been deprived of their use altogether (*i*).

The seizure must not extend to privileged goods (unless as regards those enjoying only a qualified privilege there be no other sufficient distress on the premises) (*k*), or the distress will be illegal; nor to more goods than are reasonably necessary to satisfy the arrears of rent due with the expenses, or the distrainer will render himself liable to an action for excessive distress (*l*). Where a second seizure becomes necessary (*e.g.*, where a bailiff being lawfully in possession is forcibly expelled after making an inventory of the goods upon which he has distrained), it should be confined to the goods taken on the first occasion (*m*).

(*a*) *Pool v. Lewin Crawcour & Co.*, 1 T. L. R. 165.

(*b*) *Wood v. Nunn*, 5 Bing. 10.

(*c*) Per Cockburn, C. J., in next-cited case.

(*d*) *Cramer v. Mott*, L. R. 5 Q. B. 357. It makes no difference in such case that the words by which the landlord expresses his intention to prevent the removal are not actually spoken on the demised premises: *id*.

(*e*) *Werth v. London and Westminster Loan Co.*, 5 T. L. R. 320.

(*f*) See *ante*, p. 516.

(*g*) *Werth v. London and Westminster Loan Co.*, *supra*.

(*h*) Per Kelly, C. B., in next-cited case.

(*i*) *England v. Cowley*, L. R. 8 Ex. 126.

(*k*) *Ante*, pp. 494—512.

(*l*) As to this, see p. 576, *post*.

(*m*) *Smith v. Torr*, 3 F. & F. 505.

Impounding.—Impounding the distress is placing it in the custody of the law (*n*), by depositing it in a fitting pound or inclosure (*o*). Such impounding must continue for at least five days from the time of seizure before a sale can take place, unless the tenant or owner of the goods distrained replevy (*p*) them in the meanwhile (*q*); and such five days may now, upon the written request (to the landlord or other person levying the distress) of the tenant or owner, and upon his giving security for any additional cost that may thereby be occasioned, be extended to a period of not more than fifteen days (*r*).

Formerly, impounding could only take place *off* the demised premises; but now, by virtue of the statute 11 Geo. 2, c. 19, s. 10 (*s*), it may (and in two instances, by force of other enactments (*t*), must) take place *on* the premises. In neither case may the distrainor use or work the goods or cattle impounded, for he holds them merely as a pledge (*u*); and if he does, although no longer as at common law a trespasser *ab initio*, he will be liable for the damage sustained (*x*), and the owner may interfere to prevent it (*y*). The only exception to this rule is in the case where such use being necessary for the preservation of the goods is really for the benefit of their owner: milch-kine, for instance, may be milked for this reason, armour scoured to avoid rust, &c. (*z*). The owner, on the other hand, may make what profit of the distress he can whilst it remains impounded (*z*): but if he be permitted by the distrainor to remove it for a temporary purpose, with the intention (which is carried out) that it should be returned to the pound, this, as already seen (*a*), is not an abandonment which renders a fresh seizure necessary (*b*).

(1.) *Impounding off the premises.*—A pound is either *overt* (open) or *covert*. In the case of a pound overt the owner of the goods distrained may have access to them (*e.g.*, in the case of cattle, for the purpose of tending them) without committing

(*n*) It follows that goods impounded are not within the reputed ownership clause of the Bankruptcy Act (46 & 47 Vict. c. 52, s. 44): *Sacker v. Chidley*, 13 W. R. 690.

(*o*) Bullen, Dist. 170.

(*p*) As to this, see p. 584, *post*.

(*q*) 2 W. & M. sess. 1, c. 5, s. 2, *infra*, p. 585.

(*r*) 51 & 52 Vict. c. 21, s. 6. As to sale before the expiration of such extended period, see *infra*, p. 546.

(*s*) *Infra*, p. 543.

(*t*) Referred to *infra*, p. 543.

(*u*) Bullen, Dist. 180. As to the absence on his part of all legal interest in the goods, see *post*, p. 570.

(*x*) 11 Geo. 2, c. 19, s. 19; *post*, p. 580.

(*y*) See *post*, p. 569.

(*z*) Bullen, Dist. 180.

(*a*) *Supra*, p. 537.

(*b*) *Kerby v. Harding*, 6 Exch. 234.

trespass (c). A pound covert, on the other hand, which, unlike the former, is covered at least overhead, is sometimes a complete enclosure, as a house, barn, or stable, where the owner of the distress cannot enter (d). Household goods, or anything else capable of being stolen or damaged by weather, the distrainer should impound in a pound covert, for he is answerable for loss or damage arising from impounding such goods in an open pound (e). Cattle, on the other hand, are usually put into a pound overt, either in a pin-fold made for the purpose, or in the distrainer's own close, or in the close of another person by his consent (e). The reason of this is that at common law the distrainer thus threw the liability of sustaining the cattle (which in the case of an impounding in a pound covert fell upon him) upon the tenant or owner (e).

This liability, however, is now regulated by statute, for it is provided (f) that any person impounding—*i.e.*, bringing to the pound (g), not keeping the pound (h)—an animal in any pound shall supply it with proper food and water under a penalty of 20s. (i); and that any person may supply food and water to any animal impounded without a fit and sufficient supply for more than twelve hours, at the expense of the owner of the animal, to be paid before it is removed (k). And if such food and water are supplied by the person who impounds the animal, he may recover an amount not exceeding double their value from the owner; or at his option he may, after seven clear days from the time of impounding, and after giving three days' public printed notice, sell the animal openly at any public market and apply the proceeds in discharge of the amount of such value and the expenses of sale (l).

Notice of the impounding to the owner of the goods or cattle distrained is not necessary if it take place in a common public open pound: but if in a private or special pound, *i.e.*, one so constituted for the purpose of a particular distress (m), it was formerly otherwise, though (as the object was probably to enable

(c) Co. Lit. 47 b.

(d) Bullen, Dist. 171.

(e) Co. Lit. 47 b.

(f) 12 & 13 Vict. c. 92.

(g) *Dargan v. Davies*, 2 Q. B. D. 118. This, like some of the other cases cited under this head, was a case of distress *damage feasant*, but the same principle applies.

(h) *Dargan v. Davies*, *supra*. So the keeper of the pound is not liable if the

goods have been wrongfully distrained: see *Badkin v. Powell*, Cowp. 476.

(i) Sect. 5.

(k) Sect. 6.

(l) 17 & 18 Vict. c. 60, s. 1. One or more animals (but only to the number that may be necessary) may be sold for the expenses of nourishment incurred on behalf of all: *Layton v. Hurry*, 8 Q. B. 811.

(m) 3 Black. Comm. 13.

the owner of cattle to know where he could feed them, and the duty of feeding them, as just seen, is now imposed on the distrainer) notice would seem to be no longer necessary (*n*).

The distrainer is answerable for the condition, at the time of impounding, of the pound (even if it be a common pound) which he selects (*o*); so that where, as the result of such condition, cattle are stolen (*p*), or sustain damage (*q*), he will be liable. But if he is without default, as where the pound being in a proper condition the cattle have died there, or have been stolen or set at large by a stranger (*r*),—and he cannot tie or bind them in the pound (*s*)—he is not only not liable, but entitled to make another distress for his rent (*s*).

The provisions of the Statute of Marlebridge (*t*), which restricted the common law right whereby the distress might be impounded out of the county where it was levied (*u*), were extended by 1 & 2 Ph. and M. c. 12, which enacts (*x*) that no distress of cattle shall be driven out of the district where it is taken except to a pound overt within the same shire not more than three miles distant; and that no cattle or other goods distrained at one time shall be impounded in several places, whereby the owner shall be constrained to issue several replevies (*y*) for the delivery of such distress. The prescribed conditions that a pound must be within the county where the levy takes place, and at not more than three miles' distance, must both be fulfilled, otherwise an action (not of damages for trespass, but for the penalties (*z*) given by the statute) may be maintained (*a*); except in the case of an entire rent issuing out of adjoining parcels of land lying in different counties, when the cattle distrained in both counties may, if such counties adjoin, properly be impounded in one (*b*).

The statute (*c*) goes on to provide that every person offending contrary to the Act shall forfeit to the party grieved, for every such offence, a hundred shillings and treble damages: a proviso, however, which creates but one offence, although several persons may join in the act of impounding, and which is therefore satisfied

(*n*) Bullen, Dist. 174. Such notice was usually contained in the notice of distress, as to which see *infra*, p. 546.

(*o*) *Wilder v. Speer*, 8 A. & E. 547; *Bignell v. Clarke*, 5 H. & N. 485.

(*p*) Bullen, Dist. 173.

(*q*) *Wilder v. Speer*, *supra*; *Bignell v. Clarke*, *supra*.

(*r*) *Vaspor v. Edwards*, 12 Mod. 658, per Holt, C. J.

(*s*) Bullen, Dist. 173, 174.

(*t*) 52 Hen. 3, c. 4.

(*u*) Bullen, Dist. 174.

(*x*) Sect. 1.

(*y*) As to this, see p. 584, *post*.

(*z*) See next paragraph.

(*a*) *Woodcroft v. Thompson*, 3 Lev. 48; *Gimbart v. Polah*, 2 Str. 1272.

(*b*) *Walter v. Rumbal*, 1 Ld. Ray. 53.

(*c*) 1 & 2 Ph. & M. c. 12, s. 1.

by a single penalty (*d*). And it further enacts (*e*) that no person shall take more than fourpence for impounding and keeping in pound one whole distress, and where less has been used shall take less, under a penalty to the party grieved of 5*l*. together with the excess of the sum taken; but this section only applies where the goods distrained are removed from the demised premises to a public pound (*f*).

(2.) *Impounding on the premises*.—By 11 Geo. 2, c. 19, it is enacted (*g*) that any person “lawfully taking any distress for any kind of rent” may “impound or otherwise secure the distress so made . . . in such place or on such part of the premises chargeable with the rent, as shall be most fit and convenient for the impounding and securing such distress.” There are, however, two cases where the option conferred by the above provision does not apply (*h*). First, where the distress is levied upon “sheaves or cocks of corn, or corn loose or in the straw, or hay lying” on the premises; for the statute under which such a distress is permitted (*i*) expressly requires that “such corn, grain, or hay . . . be not removed by the person or persons distraining to the damage of the owner thereof out of the place where the same shall be found and seized, but be kept there (as impounded) until the same shall be replevied or sold.” Secondly, where a distress is levied upon “corn, grass, hops, roots, fruits, pulse, or other product whatsoever which shall be growing” on the demised premises; for the statute giving power to distrain in this case (*k*) provides that such growing crops upon being cut, when they become ripe, shall be laid up in “barns or other proper place, *on the premises*,” though it permits removal to another barn or proper place, procured for the purpose, and as near as may be to the demised premises, if the latter contain no such barn or other proper place (*l*).

No particular act of impounding—as distinct from that of seizing—is necessary in cases falling within sect. 10 of 11 Geo. 2, c. 19 (*m*). Thus impounding will be complete—a question which is of importance chiefly in reference to the time of *tender* of

(*d*) *Partridge v. Nay'or*, Cro. Eliz. 480.

(*e*) Sect. 2.

(*f*) *Child v. Chamberlain*, 5 B. & Ad. 1049. As to costs of distresses, see p. 552, *infra*.

(*g*) Sect. 10.

(*h*) *Piggott v. Birtles*, 1 M. & W. at p. 448, per Parke, B.

(*i*) 2 W. & M. sess. 1, c. 5, s. 3; *ante*, p. 500.

(*k*) 11 Geo. 2, c. 19, s. 8; *ante*, p. 497.

(*l*) Notice of the place where such goods are deposited must within one week be given to the tenant, or left at his last place of abode: sect. 9.

(*m*) See cases under seizure, *supra*, p. 538.

rent (*n*)—when a notice of distress (*o*) with an inventory is delivered (whether actually stating that the distress has been impounded (*p*) or not (*q*)), if at that time the distress be sufficiently “secured” as the statute directs (*r*); and it makes no difference that no special step is taken to secure the goods distrained, whether they be left in a particular room or place (*s*), or even left, by an arrangement with the tenant, distributed about the premises (*t*). For though a person distraining in a dwelling-house must not take the whole of it to place therein the goods he has seized, but should in strictness select one room for that purpose or remove them out of the house (*u*), the tenant may always consent to the goods remaining where they are (*x*); and as such an arrangement is chiefly for the tenant’s benefit, slight evidence of such consent will be sufficient, as where he has expressed his obligation to the landlord for allowing that course to be pursued (*y*). With regard to cattle, the impounding may take place in an open field on the demised premises, with the gates properly secured (*z*).

In the absence of evidence showing assent on the part of the tenant (*a*), it seems that the distrainor cannot in any case lock up the whole of the demised premises so as to exclude the tenant (*b*); for he can remove the goods if the premises are not in a suitable state for impounding them (*c*).

Where goods, under the above enactment, are impounded on the premises, it provides that “it shall and may be lawful to and for any person or persons whatsoever, to come and go to and from such place or part of the said premises where any distress for rent shall be impounded and secured as aforesaid, in order to view, appraise, and buy, and also in order to carry off or remove the same on account of the purchaser thereof” (*d*).

Moreover, once the goods are in the custody of the law, actual retention of possession by the distrainor is unnecessary (*e*).

(*n*) *Post*, pp. 560—562.

(*o*) See p. 546, *infra*.

(*p*) *Thomas v. Harries*, 1 M. & Gr. 695.

(*q*) *Swann v. Lord Falmouth*, 8 B. & C. 456; *Tennant v. Field*, 8 E. & B. 336.

(*r*) *Thomas v. Harries*, *supra*, per Tindal, C. J.

(*s*) *Firth v. Purvis*, 5 T. R. 432.

(*t*) *Tennant v. Field*, *supra*; *Johnson v. Upham*, 2 E. & E. 250.

(*u*) *Woods v. Durrant*, 16 M. & W. 149, per Parke, B.

(*x*) *Tennant v. Field*, *supra*.

(*y*) *Washborn v. Black*, 11 East, 405, n.

(*z*) *Castleman v. Hicks*, Car. & M. 266.

(*a*) *Cox v. Painter*, 7 C. & P. 767, is probably to be explained on this ground.

(*b*) *Etherton v. Popplewell*, 1 East, 139.

Walker v. Woolcott, 8 C. & P. 352.

(*c*) *Smith v. Ashforth*, 29 L. J. Ex. 259.

(*d*) 11 Geo. 2, c. 19, s. 10.

(*e*) *Jones v. Biernstein*, [1899] 1 Q. B. 470; *affd.*, C. A., [1900] 1 Q. B. 100. Cf. *supra*, p. 537.

Sale.—The next step in distress proceedings is the sale. At common law a distress, as already stated (*f*), was only a pledge in the hands of the distrainer, and—with the apparent exception of a distress upon the two special kinds of property made distrainable by statute (viz. sheaves of corn, &c., by 2 W. & M. sess. 1, c. 5, s. 3 (*g*), and growing crops, by 11 Geo. 2, c. 19, s. 8 (*h*)), where a sale has been said to be compulsory (*i*)—he may still treat it as a pledge, inasmuch as the enactment (*k*) which first introduced the power of sale has been held to be merely permissive (*l*).

The right of sale and the proceedings thereunder are still regulated by the enactment in question, as modified by two provisions of the Law of Distress Amendment Act, 1888. These enactments may be considered together.

By 2 W. & M. sess. 1, c. 5, s. 2, “where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods so distrained shall not, within five days next after such distress taken and notice thereof (with the cause of such taking) left at the chief mansion-house or other most notorious place on the premises charged with the rent distrained for, replevy (*m*) the same, with sufficient security to be given to the sheriff (*n*) according to law, then in such case after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may . . . cause the goods and chattels so distrained to be appraised by two . . . appraisers . . . and after such appraisement shall and may lawfully sell the goods and chattels so distrained for the best price that can be gotten for the same, towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement, and sale, leaving the overplus (if any) in the hands of the . . . sheriff” or “under-sheriff” of the county, “or constable” of the hundred, parish, or place where such distress shall be taken, “for the owner’s use” (*o*). And now, by 51 & 52 Vict. c. 21, the above

(*f*) *Ante*, p. 476.

(*g*) *Ante*, pp. 500, 543.

(*h*) *Ante*, pp. 497, 543.

(*i*) *Piggott v. Birtles*, 1 M. & W. at p. 448, per Parke, B.

(*k*) 2 W. & M. sess. 1, c. 5, s. 2, *infra*.

(*l*) *Philpott v. Lehatn*, 35 L. T. 855; *Hudd v. Ravenor*, 2 B. & B. 662. But as to the necessity in such case to remove the goods, see *infra*, p. 550.

(*m*) As to this, see *post*, p. 584.

(*n*) See now note (*h*), p. 585, *post*.

(*o*) So much of the above statute as required in addition the sheriff, under-sheriff, or constable to assist at the distress, and to swear the appraisers (who need no longer be sworn), is repealed by 35 & 36 Vict. c. 92, s. 13, and, though that section is itself repealed by 46 & 47 Vict. c. 39, is not revived by that repeal: see sect. 1 of last-cited Act, and 52 & 53 Vict. c. 63, s. 11.

period of five days is "extended (*p*) to a period of not more than fifteen days if the tenant or . . . owner (of the goods and chattels distrained) make a request in writing (*q*) in that behalf to the landlord or other person levying the distress, and also give security for any additional cost that may be occasioned by such extension of time; provided that the landlord or person levying the distress may, at the written request or with the written consent of the tenant or such owner as aforesaid, sell the goods and chattels distrained, or part of them, at any time before the expiration of such extended period as aforesaid." Moreover, "so much of" the above statute "as requires appraisement before sale of goods distrained" is now repealed (*r*), except in cases where the tenant or owner of the goods and chattels "by writing requires such appraisement to be made: and the landlord or other person levying a distress may, except as aforesaid, sell the goods and chattels distrained without causing them to be previously appraised; and for the purposes of sale the goods and chattels distrained shall, at the request in writing (*s*) of the tenant or owner of such goods and chattels, be removed to a public auction room or to some other fit and proper place specified in such request and be there sold (*r*). The costs and expenses of appraisement when required by the tenant or owner shall (*r*) be borne and paid by him; and the costs and expenses attending any such removal, and any damage to the goods and chattels arising therefrom, shall be borne and paid by the person requesting the removal."

The application and effect of the above statutory provisions may be considered under the following heads:—

Notice of distress.—No notice of distress is required at common law (*t*); it must, however, as has been seen (*u*), always be given when a sale of the goods is intended (*x*). Such a notice, besides usually specifying the amount of rent in arrear (*y*), should inform the tenant what are the goods taken (*z*). This is usually done by furnishing him with a copy of an inventory to which the notice itself is subjoined (*a*); the distress must be confined to the articles comprised in the inventory (*b*), nor will the fact that the presence

(*p*) Sect. 6.

(*q*) See form in Bullen, Dist. 305.

(*r*) Sect. 5.

(*s*) See form in Bullen, Dist. 306.

(*t*) *Kerby v. Harding*, 6 Exch. at p. 240, per Parke, B.

(*u*) *Supra*, p. 545.

(*x*) See form in Bullen, Dist. 158-9.

(*y*) See next paragraph.

(*z*) *Kerby v. Harding*, *ubi sup.*

(*a*) Bullen, Dist. 157-8, where form of inventory is given.

(*b*) *Sims v. Tuffs*, 6 C. & P. 207.

on the premises of other goods not so comprised was only discovered afterwards justify their inclusion in the distress (*c*). The notice should give the tenant such information with sufficient certainty, in order that he may know exactly what goods have been seized (*d*). Thus, though a notice, specifying certain articles "and any other goods and effects that may be found in and about the premises," has been held sufficient where all such goods were in fact seized (*e*), a notice which specifies certain articles "and all other goods, chattels, and effects on the premises that may be required in order to satisfy" the landlord's claim is invalid, and *à fortiori* as against a third person whose goods are included in the distress (*f*).

But though it be irregular to sell without giving proper notice (*g*), an omission to give it does not render the distress illegal (*h*); and a mere error or defect in it, *e.g.*, in the name of the person on whose behalf the distress is made (*i*), or in the time at which the rent distrained for became due (*k*),—it being unnecessary to specify such time at all (*l*)—will be immaterial, inasmuch as a person who has a right to distrain may allege one cause and justify for another (*m*). And though the notice, as already stated (*n*), usually informs the tenant what is the amount of rent in arrear, there is no duty cast on the distrainer to this effect (*o*), the tenant being presumed to know what those arrears are (*o*), and consequently bound to tender the proper sum (*p*). Hence, the mere fact of taking or selling *on a claim* of more than is due—even if done maliciously (*q*)—will not (in the absence of special damage) give the tenant any cause of action (*r*), so long as more goods are not actually taken and sold than are sufficient to satisfy the real amount due (*s*); for from the mere allegation that the distrainer sold for the alleged arrears and costs it is not to be inferred that he sold more than was necessary to raise the amount of the

(*c*) *Bishop v. Bryant*, 6 C. & P. 484.

(*d*) *Kerby v. Harding*, *supra*.

(*e*) *Wakeman v. Lindsey*, 14 Q. B. 625.

(*f*) *Kerby v. Harding*, 6 Exch. 234.

(*g*) As to the damages, see p. 579, *post*.

(*h*) 11 Geo. 2, c. 19, s. 19, *post*, p. 580; *Trent v. Hunt*, 9 Exch. 14.

(*i*) *Wootley v. Gregory*, 2 Y. & J. 536.

(*k*) *Gambrell v. Lord Falmouth*, 4 A. & E. 73.

(*l*) *Moss v. Gallimore*, 1 Doug. 279; 1 Sm. L. C. 514.

(*m*) *Trent v. Hunt*, *supra*; *Phillips v. Whitteed*, 2 E. & E. 804.

(*n*) See last paragraph.

(*o*) *Tancred v. Leyland*, 16 Q. B. at p. 680, per Parke, B.

(*p*) See *Glynn v. Thomas*, 11 Exch. 870. As to tender, see p. 560, *post*.

(*q*) *Stevenson v. Newnham*, 13 C. B. 285.

(*r*) *Tancred v. Leyland*, 16 Q. B. 669 (overruling *Taylor v. Henniker*, 12 A. & E. 488).

(*s*) *Id.*; *French v. Phillips*, 1 H. & N. 564. See *post*, p. 597.

arrears actually due (*t*). Similarly the mere fact that the notice of distress may include in the list of articles seized certain fixtures (which as already seen (*u*) are not distrainable) gives no right of action so long as they are not actually removed or damaged, and this even if purported to be sold under the distress (*x*).

The notice must be in writing (*y*); but though the statute specifies a particular mode of bringing it to the tenant's knowledge, personal service of it will always be sufficient (*z*). As against a stranger whose goods have been seized, notice to him will satisfy the statute, for such notice, as it has been laid down, sufficiently affects him (*a*).

Appraisement.—Though the absence of appraisement made a sale irregular (*b*), the tenant, even before the Law of Distress Amendment Act, might, as against himself, dispense with it (*c*), and, as has been seen, it is now never necessary except on a special request made by him or the owner of the goods distrained. (This apparently applies also to one of the two cases of statutory distress (*d*), viz. sheaves of corn, &c., since the Act in question seems to apply to the third section (*e*) of 2 W. & M. sess. 1, c. 5, as well as to the second; but not to the other, viz. growing crops, since they are distrainable under a different statute (*f*), which specially provides that they are to be appraised when cut and gathered and not before. Appraisement, therefore, would still seem necessary in this last case.) Where appraisement is resorted to, the appraisers must be reasonably competent and disinterested, though not necessarily professional persons (*g*); and the tenant will not be concluded by their appraisement (which is only *prima facie* evidence of the value of the goods (*h*)), so as to be prevented from afterwards questioning whether the best means have been taken to make it (*i*). The statute (*k*), as will have been seen, requires two appraisers to be appointed, and this number must be observed except by consent of the tenant (*l*): the expression "by one broker

(*t*) *Glynn v. Thomas*, *supra*.

(*u*) *Ante*, p. 496.

(*x*) *Beck v. Denbigh*, 29 L. J. C. P. 273.

(*y*) *Wilson v. Nightingale*, 8 Q. B. 1034.

(*z*) *Waller v. Rumbal*, 1 Ld. Ray. 53.

(*a*) *Id.* As to his rights in replevin, see p. 584, *post*.

(*b*) *Messing v. Kemble*, 2 Camp. 115. As to damages, see p. 579, *post*.

(*c*) *Bishop v. Bryant*, 6 C. & P. 484.

(*d*) *Supra*, p. 543.

(*e*) Under which they are distrainable: *ante*, p. 500.

(*f*) 11 Geo. 2, c. 19, s. 8. *Ante*, p. 497.

(*g*) See *Roden v. Eyton*, 6 C. B. 427.

(*h*) *Cook v. Corbett*, 24 W. R. 181.

(*i*) *Clarke v. Holford*, 2 C. & K. 540. See *post*, p. 577.

(*k*) 2 W. & M. sess. 1, c. 5, s. 2.

(*l*) *Allen v. Flicker*, 10 A. & E. 640 (*Fletcher v. Saunders*, 6 C. & P. 747, *cont.*, may be regarded as overruled).

or more" contained in stat. 57 Geo. 3, c. 93, schedule, and the Distress for Rent Rules, 1888, App. II. (*m*), applying only to the employment of a single appraiser by consent (*n*).

The distrainor himself cannot act as an appraiser (*o*), for the object of the statute is that the appraisers should be a check upon him (*p*).

The appraisement is usually written on the inventory and signed by the appraisers (*q*), the stamp required being regulated according to the amount of the valuation under the Stamp Act, 1891 (*r*). The expenses of appraisement are to be paid, as has been seen, by the person (*i.e.*, the tenant or owner of the goods) who requires it. The mere act of appraisement does not deprive the tenant of his right to replevy his goods (*s*), a right which, as will be seen, endures until their actual sale (*t*).

Time of sale.—(*a*) How soon.—If the goods have not been replevied (to ascertain which search should be made in the registrar's office of the County Court (*u*)), the sale, as has been seen (*x*), may take place five days after the taking of the distress and delivery of the notice. This means that five *clear* days must intervene (*y*); but such five days are now (*z*) to be extended upon the request of the tenant or owner to fifteen, which extended period, however, may at any time at his request or with his consent be determined. It is to be observed that a premature sale, though irregular, does not render the distress illegal (*a*), and therefore the tenant will not be entitled to recover in respect of it unless he suffer some actual damage (*b*). The same thing applies where growing crops seized under 11 Geo. 2, c. 19, s. 8, are sold—contrary to that statute (*c*), so that such sale is void (*d*)—before they are ripe and while still in a growing state (*e*).

(*m*) *Infra*, p. 554.

(*n*) *Allen v. Flicker*, *supra*.

(*o*) *Westwood v. Cowne*, 1 Stark. 172; *Rocke v. Hills*, 3 T. L. R. 298.

(*p*) *Lyon v. Weldon*, 2 Bing. 334, per Best, C. J.

(*q*) Bullen, Dist. 191.

(*r*) 54 & 55 Vict. c. 39, s. 24, and 1st sched. See p. 554, *infra*.

(*s*) *Jacob v. King*, 5 Taunt. 451.

(*t*) *Infra*, p. 551.

(*u*) *Post*, p. 585.

(*x*) *Supra*, p. 545.

(*y*) *Robinson v. Waddington*, 13 Q. B. 753 (in reversal of *Wallace v. King*, 1 H. Bl. 13, and *dictum* of Tindal, C. J.,

in *Harper v. Taswell*, 6 C. & P. 166); *Sharp v. Fowle*, 12 Q. B. D. 385. (The marginal note in 13 Q. B. 753 is incorrect.)

(*z*) *Supra*, p. 546.

(*a*) 11 Geo. 2, c. 19, s. 19, *post*, p. 580. See *Proudlove v. Twemlow*, 1 Cr. & M. 326.

(*b*) *Lucas v. Tarleton*, 3 H. & N. 116; 11 Geo. 2, c. 19, s. 19. See p. 579, *post*.

(*c*) *Ante*, p. 497, n.

(*d*) *Owen v. Legh*, 3 B. & A. 470.

(*e*) *Rodgers v. Parker*, 18 C. B. 112 (reported as *Rogers v. Parker*, 25 L. J. C. P. 220).

It follows that where the effect of a premature sale is the loss of his goods to a third person, he will be entitled to recover their value, and this even though their protection from distress only depends upon the performance of a condition which has not been performed before such sale takes place (*f*).

(b) *How late.*—The distrainer has a reasonable time after the lapse of the five (or fifteen) days in which to sell and remove the goods (*g*); but if he exceed such time he becomes a trespasser (*h*), for by continuing on the premises he disturbs the tenant in his occupation of them beyond the time allowed by law (*i*). The tenant, however, may request or consent to a postponement of the sale (*k*), and if he does the landlord will be justified in detaining a stranger's goods which he does not know not to be those of the tenant (*l*); nor is such consent a proof in itself of collusion between landlord and tenant to defeat the rights of third parties (*m*). A document giving such consent does not require a stamp (*n*).

Place of sale.—Where the goods are impounded on the premises under the provisions of 11 Geo. 2, c. 19, s. 10 (*o*), that enactment provides that it shall be lawful for the distrainer "to appraise, sell, and dispose of the same upon the premises, in like manner and under the like directions and restraints to all intents and purposes, as any person taking a distress for rent may now do off the premises." But whether the goods be impounded on or off the premises, the tenant or owner of the goods may now, by written request for the purposes of sale (*p*), have them removed (at his own risk and expense) to a public auction room or some other fit and proper place specified by him. Such a request will not afterwards prevent him from objecting to the distress as illegal (*q*).

Parties to sale.—The vendor is under the statute (*r*) the "person distraining"; a bailiff, however, whose authority is withdrawn before the sale takes place, cannot afterwards sell any of the goods to satisfy his claim for expenses (*s*). The purchaser, on the other

(*f*) *Sharp v. Fowle*, 12 Q. B. D. 385; (decided under the Lodgers' Goods Protection Act, *ante*, p. 506).

(*g*) *Pitt v. Shew*, 4 B. & A. 208.

(*h*) *Griffin v. Scott*, 2 Ld. Ray. 1424.

(*i*) *Winterbourne v. Morgan*, 11 East, 395.

(*k*) *E.g., Hills v. Street*, 5 Bing. 37; *Willoughby v. Backhouse*, 2 B. & C. 821.

See Bullen, Dist. 187-8, where a form of such request is given.

(*l*) *Fisher v. Algar*, 2 C. & P. 374.

(*m*) *Harrison v. Barry*, 7 Price, 690.

(*n*) *Fishwick v. Milnes*, 4 Exch. 825.

(*o*) *Supra*, p. 543.

(*p*) *Supra*, p. 546.

(*q*) *Masters v. Fraser*, 85 L. T. 611.

(*r*) *Supra*, p. 545.

(*s*) *Harding v. Hall*, 14 L. T. 410.

hand, must be some third person; the landlord cannot purchase the goods himself (*t*), even (as it has been held) at a sale by public auction (*u*).

Mode of sale.—The sale need not necessarily be by auction, nor is it necessary to observe any particular order in the disposal of the goods (*x*); and even where the goods seized comprise some which are privileged from distress as long as no other sufficient distress on the premises can be found (*y*), yet if they are once distrained it is not, as already mentioned (*z*), necessary to postpone their sale to that of the other goods (*a*).

Effect of sale.—The effect of the sale is, by transferring the ownership of the goods, to put an end to the right to replevy them a right, however, which lasts till then even though the goods have been removed from the premises (*b*), for until that time the property in them remains in their owner (*c*). The mere fact that the sale has been conducted irregularly does not deprive the purchaser of a good title to the goods (*d*); though if the sale is altogether wrongful (so that in effect there has been no sale at all) he acquires no title against the true owner (*e*). Where a sale purported to be made under a distress-warrant (to the knowledge of the plaintiff), but there was no real tenancy in existence at all, it was held that a purchaser, who had been compelled to restore the goods to their owners and had incurred consequential expenses, had no remedy against the auctioneer as on an implied warranty of title (*f*).

It seems never to have been directly decided whether the mere fact that a distress proves to be illegal prevents a purchaser from obtaining a good title to the goods after their sale. That title, of course, depends (*g*) on the stat. 2 W. & M. sess. 1, c. 5, which, as has been seen, enacts (*h*) that when goods have been "distrained," and certain other conditions fulfilled (*i*), the distrainor may lawfully sell them. From the circumstance, however, that it has

(*t*) *King v. England*, 4 B. & S. 782.

(*u*) *Moore v. Singer Manufacturing Co.*, [1904] 1 K. B. 820.

(*x*) Bullen, Dist. 191, 194.

(*y*) *Ante*, pp. 510—512.

(*z*) *Ante*, p. 510.

(*a*) See *Jenner v. Yolland*, 6 Price, 3.

(*b*) *Jacob v. King*, 5 Taunt. 451; *supra*, p. 549.

(*c*) *Moore v. Pyrke*, 11 East, 52, per Lord Ellenborough, C. J. The decision itself has been disapproved of: see

Bandy v. Cartwright, 22 L. J. Ex. 285, per Pollock, C. B.

(*d*) *Lyon v. Weldon*, 2 Bing. 334; 11 Geo. 2, c. 19, s. 19, referred to *post*, p. 580.

(*e*) *Harding v. Hall*, 14 L. T. 410; *King v. England*, 4 B. & S. 782.

(*f*) *Payne v. Elsdon*, 17 T. L. R. 161.

(*g*) See 56 & 57 Vict. c. 71, s. 21.

(*h*) Sect. 2.

(*i*) *Supra*, p. 545.

been held by the Court of Appeal (*k*) that an illegal distress is altogether void (so as to permit of a subsequent distress for the same rent (*l*)), it seems difficult to escape from the conclusion that the goods have not been "distraigned" at all, and consequently that no title is capable of being acquired. At the same time, the conclusion in question seems rather a startling one, and in the absence of a direct decision should not, it is thought, be adopted (*m*).

Price.—The statute, as has been seen (*n*), requires that the best price should be obtained for the goods. Any neglect or mismanagement during the conduct of the sale, such as not allotting the goods properly, or allowing them to become damaged by weather (*o*), or selling subject to a condition which lowers the price obtained,—*e.g.*, requiring agricultural produce to be expended on the demised land, even though there be a covenant to that effect binding on the tenant (*p*)—will support a claim for not selling at the best price.

Overplus.—Under the statute any overplus there may be from the sale, after satisfaction of the rent and expenses, should be left in the hands of the sheriff, under-sheriff, or constable for the owner's use (*q*). If this be not done an action will lie on the statute (*r*)—but not an action for money had and received (*s*),—in which action the propriety of the charges (*t*) may be questioned (*u*); nor does the mere fact that the overplus has been received by the tenant himself without objection disentitle him to recover, it being a question of fact whether he received it in satisfaction, and if not whether it was sufficient in amount to satisfy the balance due (*u*). With regard to surplus *goods*, the landlord may always return them to the premises if removed therefrom, even though he may have had notice of a claim to them from a third party (*x*).

Costs.—Costs of distresses are now regulated by the Distress for Rent Rules, 1888 (*y*). Different scales are provided according as *the amount of rent demanded and due*—the amount which the goods

(*k*) *Grunnell v. Welch*, [1906] 2 K. B. 555, adopting judgment of Court below, [1905] 2 K. B. 650.

(*l*) *Post*, p. 563.

(*m*) *Id.*, where a short criticism of the last-mentioned decision is submitted.

(*n*) *Supra*, p. 545.

(*o*) *Poynter v. Buckley*, 5 C. & P. 512.

(*p*) *Ridgway v. Stafford*, 6 Exch. 404; *Nix v. Fitzwilliam*, 9 J. P. 212; *Hawkins*

v. Walrod, 1 C. P. D. 280. See *ant*, pp. 291-5.

(*q*) *Supra*, p. 545.

(*r*) *Lyon v. Tomkies*, 1 M. & W. 603.

(*s*) *Yates v. Eastwood*, 6 Exch. 805; *Evans v. Wright*, 2 H. & N. 527.

(*t*) See under next head.

(*u*) *Lyon v. Tomkies*, *supra*.

(*x*) *Evans v. Wright*, *supra*.

(*y*) Rules 15 & 16.

actually realize is immaterial (*z*)—does or does not exceed the sum of 20*l*. These rules apply to both classes of distresses; but formerly the latter class alone was regulated by statute, the only requirement as to distresses made for sums exceeding the 20*l*. limit being that the charges made should be reasonable. This statute (57 Geo. 3, c. 93) is still unrepealed (*a*); and it directs (*b*) that in the case of a distress not exceeding that limit no person making it “shall have, take, or receive out of the produce of the goods or chattels distrained upon and sold, or from the tenant distrained on, or from the landlord, or from any other person whatsoever, any other or more costs and charges for and in respect of such distress, or any matter or thing done therein,” than those fixed by the schedule (*c*). It has, however, been held that the object of this Act was only to prevent excessive fees from being levied *as such* against the landlord or against the tenant, and that, in the absence of words prohibiting contracts made contrary to its provisions, it did not render illegal a special agreement for extra remuneration of the bailiff entered into by a landlord employing him to distrain, so as to expose the former to the penalties presently referred to (*d*). The statute (it has been held) does not preclude the tenants and persons for whose benefit it was made from contracting themselves out of that benefit (*e*).

The charges, it will be noticed, sanctioned by the earlier Act are with two exceptions (*f*) the same as those allowed by the present rules; but it specified certain penalties to be recovered by a certain procedure, and these, it is conceived, may still be enforced (*g*). The penalty for taking excessive charges (including charges for any act not really done (*h*)) is, under the above Act (*i*), treble the amount so unlawfully taken, to be recovered summarily before a justice of the district, together with full costs; and the recovery of such penalty is not to bar other remedies (*k*), except so far as

(*s*) See *Child v. Chamberlain*, 5 B. & Ad. 1049; *Megson v. Mapleton*, 49 L. T. 744.

(*a*) See 53 & 54 Vict. c. 51.

(*b*) 57 Geo. 3, c. 93, s. 1.

(*c*) A similar direction is now contained in the Distress for Rent Rules 1888, r. 15.

(*d*) *Robson v. Biggar*, [1907] 1 K. B. 690.

(*e*) *Lumsden v. Burnett*, [1898] 2 Q. B. 177, per Chitty, L. J.

(*f*) The payment to the man in pos-

session, displaced (see *infra*, note (*r*)), by the higher payment (to include board) now allowed, and the expenses of removal where requested by the tenant.

(*g*) See *Robson v. Biggar*, *supra* (where, however, as just seen, the proceedings failed).

(*h*) See *infra*, p. 555.

(*i*) 57 Geo. 3, c. 93, s. 2 (as modified by 47 & 48 Vict. c. 43, s. 4).

(*k*) *Id.*, s. 4. Cf. a similar provision in 51 & 52 Vict. c. 21, s. 7, *supra*, pp. 531, 533.

any complaint under the Act shall have been determined by the order of the justice by whom it is heard.

But no order is to be made against the landlord unless he shall have personally levied the distress (*l*), a provision, however, which will not prevent the landlord from being liable to an action of excessive distress by the tenant (*m*), if the bailiff has seized more goods than are necessary in order to be able to include his over-charge in the amount realized (*n*).

The present scales of costs are as follows (*o*):—

	Scale I. (Exceeding 20 <i>l</i> .)	Scale II. (Not exceeding 20 <i>l</i> .)
Levying distress (<i>p</i>)...	Three per cent. on any sum exceeding 20 <i>l</i> . and not exceeding 50 <i>l</i> .; 2½ per cent. on any sum exceeding 50 <i>l</i> . and not exceeding 200 <i>l</i> .; and 1 per cent. on any additional sum (<i>q</i>).	Three shillings.
Man in possession	5 <i>s</i> . per day (to provide his own board in every case).	4 <i>s</i> . 6 <i>d</i> . per day (to provide his own board in every case) (<i>r</i>). (If any) 10 <i>s</i> .
Advertisements	The sum actually and necessarily paid.	
Appraisement (on tenant's written request) (<i>s</i>).	Whether by one broker or more, 6 <i>d</i> . in the pound on the value as appraised, in addition to the amount for the stamp (<i>t</i>).	
Withdrawal of distress or where no sale takes place, and for negotiations between landlord and tenant respecting the distress.	Reasonable fees, charges, and expenses, to be taxed in case of difference by the registrar (<i>u</i>).	

(*l*) 57 Geo. 3, c. 93, s. 4.

(*m*) See *post*, p. 576.

(*n*) *Megson v. Mapleton*, 49 L. T. 744.

(*o*) Distress for Rent Rules, 1888, App. II.

(*p*) As to the sums payable under 1 & 2 Ph. & M. c. 12, s. 2, for impounding goods distrained in a public pound, see p. 542, *supra*.

(*q*) These sums belong to the bailiff

(*t*) The stamp duties are as follows (54 & 55 Vict. c. 39, 1st sched.):—

Where the appraisement does not exceed £5	0 <i>s</i> . 3 <i>d</i> .
Where it exceeds £5 but "	"	10
" " 10 "	"	20
" " 20 "	"	30
" " 30 "	"	40
" " 40 "	"	50
" " 50 "	"	100
" " 100 "	"	200
" " 200 "	"	500
" " 500		£1 0 0

(*u*) Distress for Rent Rules, 1888, r. 17. The costs of such taxation are in

as against his employer: *Philippe v. Rees*, 24 Q. B. Div. 17 (overruling *Code v. Johns*, 17 Q. B. D. 714).

(*r*) Under 57 Geo. 3, c. 93, *supra*, this sum was only 2*s*. 6*d*. See *infra*, p. 555. It will not be allowed in the case of a distress on growing crops (*ante*, p. 497) while they are becoming ripe: see *Ex parte Arndson*, L. R. 3 Ex. 56 (a distress for tithes).

(*s*) *Supra*, p. 548.

the registrar's discretion (*id.*), and the fee payable to him is 10*s*.

	Scale I. (Exceeding 20 <i>l</i> .)	Scale II. (Not exceeding 20 <i>l</i> .)
Removal (at tenant's request).		Reasonable expenses, to be taxed in case of difference by the registrar (<i>x</i>).
Commission, &c.	To auctioneer on sale by auction: —7½ per cent. on the sum realized not exceeding 100 <i>l</i> .; 5 per cent. on the next 200 <i>l</i> .; 4 per cent. on the next 200 <i>l</i> .; and on any sum exceeding 500 <i>l</i> ., 3 per cent. up to 1,000 <i>l</i> ., and 2½ per cent. on any sum exceeding 1,000 <i>l</i> . A fraction of 1 <i>l</i> . to be in all cases reckoned 1 <i>l</i> .	One shilling in the pound on the net produce of the sale. (This amount also includes payment for catalogues, sale and delivery.)

As regards the charge for the man in possession, it should be noticed that the Act of 1817 specifically provides that no person whatsoever may make any charge for any act or thing for which it allows payment unless such act has been really done (*y*), there being no corresponding provision in the more modern code. It has been held that in a distress under this Act no charge can (in the absence of a binding agreement on the part of the person distrained on to pay it) be made for a man in possession unless he has remained in real possession (*z*); and that a "man in possession" means one in possession of the goods seized, but not necessarily in possession of them on the premises where they were seized (*a*). How far these decisions would apply to the second scale of the more modern system (in which the payment sanctioned is, as will be observed, different), and how far they would apply to the first (which deals with matters untouched by the earlier Act), are, perhaps, questions which at present cannot be regarded as altogether clear (*b*).

Every bailiff levying a distress must, *on the request of the tenant*, produce to him a copy of the table of fees, charges, and expenses authorized by the rules, which are to be posted up by the registrar

(*x*) Distress for Rent Rules, r. 17; but the fee payable for the costs of taxation (which are in the registrar's discretion) is only 5*s*. As to removal, see p. 550, *supra*.

(*y*) Sect. 1.

(*z*) *Lumsden v. Burnett*, [1898] 2 Q. B. 177.

(*a*) *Scott v. Denton*, [1907] 1 K. B. 456. *See qu.*

(*b*) It will be noticed that the more modern code specially directs that the man in possession is to provide his own board: a direction which certainly seems to point to a possession of the goods on the premises only where the seizure has taken place. And *op. table of fees on writs of *f. fa.* in Judge's order of August 31st, 1888 (Nos. 4, 5, and 6) under Sheriffs Act (50 & 51 Vict. c. 55), s. 20.*

in a conspicuous place in his office (c). With this requirement should be compared that imposed by the 6th section of the 57 Geo. 3, c. 93, which, unlike the other sections of that Act, applies to both classes of distresses, and which provides that "every broker or other person who shall make and levy any distress whatsoever shall give a copy of his charges, and of all the costs and charges of any distress whatsoever, signed by him, to the person or persons on whose goods and chattels any distress shall be levied." This section—which has been said not to apply unless a sale takes place (d), and which has been held not to render the landlord liable if he does not personally interfere in the distress (e)—prescribes to the bailiff the duty, *without any request from the party distrained upon*, of furnishing, not a copy of the fees, &c., which he is *entitled* to charge, but a copy of his actual charges (f), and is consequently, it is presumed, unaffected by the later legislation.

The fact that the goods have not been sold—as where the tenant makes a request to that effect, and engages to pay the charges for levying and keeping a man in possession—will not prevent him from availing himself of the above statutory provisions to recover back any excessive charges which may have been made, and which he has paid to avoid the removal of the goods (g).

(c) Distress for Rent Rules, 1888, r. 18.

(d) *Hills v. Street*, 5 Bing. at p. 39, per Gaselce, J.

(e) *Hart v. Leach*, 1 M. & W. 560.

(f) See per Parke, B., in last-cited case.

(g) *Hills v. Street*, 5 Bing. 37.

CHAPTER VII.

DISTRESS—RIGHT HOW LOST.

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<i>To the proper person</i>	560	<i>same rent</i>	562

(1) **Payment (or its equivalent).**—When once the right to distress has arisen, nothing but payment of the rent, or something which the law regards as equivalent thereto, will in general extinguish it. The acceptance by the landlord, for instance, of a bill or note for or on account of rent due will not destroy it, or even (in the absence of an understanding to that effect) suspend it while the bill or note is running (*a*); nor will an agreement by him to accept interest on such rent (*b*). But the acceptance of a bill or note affords evidence of an agreement by the landlord to suspend his right of distress during the currency of the instrument (*c*). And the recovery of judgment in an action for rent has been held to render a subsequent distress illegal by reason of a merger of that right in the judgment (*d*). It is, however, submitted that the right of distress is a remedy collateral to and concurrent with the right of action, and that, in conformity with principle, the judgment being only a security for the original cause of action, cannot operate to change that remedy until it has been made productive in satisfaction (*e*). So, too, a mere agreement, in indulgence of the

(*a*) *Davis v. Gyde*, 2 A. & E. 623; *Palfrey v. Baker*, 3 Price, 572; *Parrott v. Anderson*, 7 Exch. 93; *ante*, p. 158.

(*b*) *Skerry v. Preston*, 2 Chit. 245.

(*c*) *Palmer v. Bramley*, [1895] 2 Q. B. 405.

(*d*) *Chancellor v. Webster*, 9 T. L. R. 568; *Potter v. Bradley*, 10 T. L. R. 445.

(*e*) See *Drake v. Mitchell*, 3 East, 251,

per Lord Ellenborough, C. J., followed by C. A. in *Wegg Prosser v. Evans*, [1895] 1 Q. B. 108; and see also *Phillips v. Shervill*, 6 Q. B. 944, per Lord Denman, C. J., and the judgments of Patteson, J., in *In re Emmett*, 14 J. P. 530 (cited *post*, p. 823), and of Fitzgerald, J., in *Wakefield v. Smythe*, 16 Ir. C. L. Rep. 173 (cited *post*, p. 671).

tenant, to allow a certain rent fixed by a lease to be paid during a certain period by instalments will not, as it seems, prevent the landlord, even if he have himself distrained for the rent on the new basis, from distraining for subsequent rent in accordance with the old (*f*).

A mere right again of set-off in the tenant does not take away, either at law (*g*) or in equity (*h*), the landlord's right to distrain for his rent in full (*i*). The Agricultural Holdings Act (*k*), however, provides that "where the compensation due under this Act or under any custom or contract to a tenant has been ascertained before the landlord distrains for rent due, the amount of such compensation may be set off against the rent due, and the landlord shall not be entitled to distrain for more than the balance" (*l*).

Where, for instance, a fixed rent being reserved by a lease the landlord undertakes in it to allow the tenant periodically a given sum for a stipulated purpose, such an allowance, as it would seem, operates only by way of covenant, and not as a diminution of the rent so as to deprive him of his right to distrain for the whole amount (*m*). Allowances in error, however, made during a number of years by a landlord with full means of knowledge cannot afterwards be distrained for, as they operate as a settlement of the account between the parties (*n*).

But where the tenant is compelled, in order to protect himself in the enjoyment of land in respect of which his rent is payable, to make payments which ought, as between himself and his landlord, to have been made by the latter, he is considered as having been authorized by the landlord so to apply his rent due or accruing due, and this is held to be payment of the rent itself, or part of it (*o*). Such an authority is implied in every contract of demise (*p*).

This applies, for example, to payment by the tenant of landlord's rates and taxes (*q*): to payment of ground or other rent to

(*f*) *Re Smith and Hartogs*, 73 L. T. 221. See, on this case, *ante*, p. 159.

(*g*) *Willson v. Davenport*, 5 C. & P. 531.

(*h*) *Townrow v. Benson*, 3 Madd. 203; *Pratt v. Keith*, 33 L. J. Ch. 528.

(*i*) *Absalom v. Knight*, Bull. N. P. 181; *Laycock v. Tufnell*, 2 Chit. 531.

(*k*) 46 & 47 Vict. c. 61. As to the holdings to which the Act applies, see ss. 54, 61, *post*, p. 728.

(*l*) Sect. 47. As to the procedure available on a dispute arising under this section, see sect. 46, *post*, p. 581.

(*m*) *Davies v. Stacey*, 12 A. & E. 506. The point was not actually decided.

(*n*) *Bramston v. Robins*, 4 Bing. 11.

(*o*) *Graham v. Allsopp*, 3 Exch. 186, per Rolfe, B.

(*p*) *Jones v. Morris*, 8 Exch. 742. See this question discussed in the notes to *Lampleigh v. Brathwait*, 1 Sm. L. C. pp. 162 *et seq.* (11th ed.).

(*q*) But only as against the instalment of rent falling due next after such payment: see cases cited *ante*, p. 200.

a superior landlord (*r*), who can, of course, distrain upon him for it (*s*) (in the case of lodgers such payment should be made under the 1st section (*t*) of the Lodgers' Goods Protection Act (*u*)): to payment of an annuity charged on the premises and enforceable against him by distress (*x*): to payment (after notice) of rent to a mortgagee who claims under a mortgage prior to the demise (*y*), and who has therefore, where the tenancy is not created under the Conveyancing Act (*z*), power to evict him (*a*):—in all these cases such payment operating as payment of the rent itself, the lessor's right of distress *pro tanto* is gone.

The point has been raised in an old case (*b*)—and the question may very probably arise again in leases of flats—whether, where the lessor covenants to repair and neglects to do so, and the repairs are thereupon executed by the lessee, the payment which he has incurred falls within the above class. The *dicta* as reported in the case referred to are much in conflict (*b*); it is, however, submitted that such payment could not be equivalent to payment of rent, on the ground that the damages recoverable against the lessor for the breach of covenant are *primâ facie* unliquidated (*c*), and that even the fact that they become ascertained when the repairs are done can make no difference (*d*).

Growing rent may be discharged by such payments as well as rent actually due (*e*). But the doctrine generally applies only where the payment made by the tenant is either that of a debt due from his landlord or a charge upon the demised land (*f*).

Apart from the case of payment or its equivalent, there are two acts by which the right of distress is defeated:—by a *tender* of the

(*r*) *Sapsford v. Fletcher*, 4 T. R. 511; *Wilkinson v. Cawood*, 8 Anst. 905; *Franklin v. Carter*, 1 C. B. 750; *Doe v. Hare*, 2 Cr. & M. 145.

(*s*) *O'Donoghue v. Coalbrook, &c., Co.*, 26 L. T. 806 (where the tenant's goods were actually sold under a distress by the head landlord); *Carter v. Carter*, 5 Bing. 406 (where such payment was made after time had been allowed for the purpose).

(*t*) *Ante*, p. 506.

(*u*) See 34 & 35 Vict. c. 79, s. 3, which provides in terms that "any payment made by any lodger pursuant to" that section "shall be deemed a valid payment on account of any rent due from him to his immediate landlord."

(*x*) *Taylor v. Zamira*, 6 Taunt. 524.

(*y*) *Johnson v. Jones*, 9 A. & E. 809; *Dyer v. Bouley*, 2 Bing. 94.

(*z*) See *ante*, p. 61.

(*a*) *Underhay v. Read*, 20 Q. B. Div. 209.

(*b*) *Taylor v. Beal*, Cro. Eliz. 222.

(*c*) This would not, of course, prevent them under the present practice from being made the subject of counterclaim in an action for the rent, though formerly they could not have been set off: see *Weigall v. Waters*, 6 T. R. 488. The tenant in this case filed a bill for relief in equity (see *Waters v. Weigall*, 2 Anst. 575), but failed on the ground that if he had a good claim at all it was one which could be enforced in a court of law.

(*d*) See *Davies v. Stacey*, *supra*.

(*e*) *Carter v. Carter*, *supra*.

(*f*) *Boodle v. Cambell*, 7 M. & Gr. 886.

rent on the part of the tenant; by a *previous distress* for the same rent on the part of the landlord.

(2) **Tender.**—The same requirements apply to tender in the case of rent as in the case of other debts (*g*); and it will be sufficient for the present purpose to deal only with those having immediate reference to the relationship of landlord and tenant. These are three in number: that the tender be made (1) without condition, (2) to the proper person, (3) of the proper amount. A valid tender of the rent must, in all cases, be actually made in order to defeat the right of distress: mere attendance on the land in order to pay it is not sufficient (*h*).

1. *Without condition.*—The chief requisite of a valid tender is that it should be unconditional (*i*). Demanding a receipt for the amount tendered will make the tender invalid if under all the circumstances of the case its effect is to require the landlord to admit, by his accepting that amount, that no more rent is due (*k*). But if the effect of such demand or other apparent condition is merely equivalent to a statement on the part of the tenant that he owes nothing more, and leaves the landlord unfettered in his claim for the excess, the tender is not thereby vitiated (*l*). Thus, sending a certain sum "to settle one year's rent" (*l*), or the use of the words "here is your quarter's rent" (*m*), or the offer of a certain sum "under protest" (*n*), may amount to a good tender. And even if a tender be invalid on the ground of a condition being attached to it by the tenant, the landlord will estop himself from afterwards taking advantage of such invalidity if the only objection he raise at the time it is made be founded on a different reason, such as the insufficiency of its amount (*o*).

2. *To the proper person.*—A tender to the landlord himself is always good: the fact that the bailiff is recognised by statute as the person entitled to receive certain costs from the tenant (*p*) is immaterial (*q*). But a tender made to his agent is also valid if he

(*g*) See Roscoe, N. P. 701 *et seq.* (17th ed.); Leake on Contracts, pt. 4, ch. 4.

(*h*) *Horne v. Lewin*, 1 Ld. Ray. 639.

(*i*) Roscoe, N. P. 704.

(*k*) *Finch v. Miller*, 5 C. B. 428.

(*l*) *Bowen v. Owen*, 11 Q. B. 130.

(*m*) *Jones v. Bridgman*, 39 L. T. 500,

disapproving *Hastings (Lord) v. Thorley*, 8 C. & P. 573.

(*n*) *Manning v. Lunn*, 2 C. & K. 13. Cp. *Greenwood v. Sutcliffe*, [1892] 1 Ch. 1.

(*o*) See *Richardson v. Jackson*, 8 M. & W. 298.

(*p*) *Ante*, pp. 552—556.

(*q*) *Smith v. Goodwin*, 4 B. & Ad. 413.

in fact have authority (*r*) to receive the rent (*s*); and such authority may be implied from circumstances, as from his having signed a distress-warrant to a bailiff on the landlord's behalf (*s*). Such distress-warrant, moreover, usually operates as an authority to the bailiff to receive the rent, so that a tender to him also will be good, even though he may have received instructions from his employer not to receive the rent (*t*); but such authority does not extend to a mere broker's man left in possession, and a tender accordingly to him has been held bad where such authority was withheld from him (*u*).

3. *Of the proper amount.*—The general principle is that tender of a smaller sum than is due, if made in respect of a single entire claim for rent, is inoperative, a creditor never being bound to accept less than his whole debt (*x*).

The amount that must be tendered (as well as the nature of the wrong inflicted by a distress after tender) depends upon the stage which the proceedings have reached when the tender is made. If it be made before entry (even after the distress-warrant has been signed and delivered to the bailiff (*y*)), it may be confined to the amount of rent actually due (*y*); and a distress will then become wholly wrongful (*z*). If it be made after entry but before impounding (*a*), the amount tendered must include the costs of the distress (*b*); and if the tenant's goods are then detained (*c*) or removed (*d*) by the landlord, such detention or removal is wrongful, but not the original taking (*e*). If it be made after the impounding, it must also include the costs of the distress, and although such tender is too late (the goods being then in the custody of the law (*f*)) to make either the taking or the detention wrongful (*g*), and therefore too late to enable the tenant to maintain an action at common law (*h*), the landlord may accept it if he please (*i*). And if made within the time allowed for replevy (*k*), the tenant may,

(*r*) See *ante*, p. 158.

(*s*) *Bennett v. Bayes*, 5 H. & N. 391.

(*t*) *Hatch v. Hale*, 15 Q. B. 10.

(*u*) *Boulton v. Reynolds*, 2 E. & E. 369.

(*x*) *Dixon v. Clark*, 5 C. B. 365.

(*y*) *Bennett v. Bayes*, *supra*.

(*z*) *The Six Carpenters' case*, 8 Co. 146 a; 1 Sm. L. C. 132 (11th ed.); *Brancomb v. Bridges*, 1 B. & C. 145; *Holland v. Bird*, 10 Bing. 15, per Tindal, C. J.

(*a*) As to what amounts to an impounding, see p. 543, *ante*.

(*b*) *Vertue v. Beasley*, 1 Moo. & R. 21.

(*c*) *Evans v. Elliott*, 5 A. & E. 142; *Loring v. Warburton*, E. B. & E. 507.

(*d*) *Vertue v. Beasley*, *supra*.

(*e*) *The Six Carpenters' case*, *supra*; *Holland v. Bird*, *ubi sup*.

(*f*) *Ante*, p. 540.

(*g*) *The Six Carpenters' case*, *supra*.

(*h*) *Ladd v. Thomas*, 12 A. & E. 117; *Thomas v. Harries*, 1 M. & Gr. 695; *Tennant v. Field*, 8 E. & B. 336.

(*i*) *West v. Nibbs*, 4 C. B. 172.

(*k*) *Ante*, pp. 545-6.

should it be refused, bring an action founded on the equity of the statute (2 W. & M. sess. 1, c. 5, s. 2), if the landlord afterwards proceeds to sell the distress (*l*).

In the case of a distress upon growing crops (*m*), the tender may be made at any time before they are ripe and cut or gathered (*n*).

(3) **Previous distress.**—The right to distrain will in general be lost by the fact of a previous distress having been made *in respect of the same rent*: for the circumstance that *previous* rent has already been distrained for will not invalidate a second distress on the same goods (*o*), even though, as it seems, in the rent distrained for there be included rent which accrued due before such previous rent itself (*p*). And the fact that the right to distrain for such previous rent is in dispute in an action pending when the later distress is levied is immaterial (*q*). The above rule, that when a distress has been once taken and the goods seized have proved insufficient to satisfy the landlord's claim a second distress for the same rent (subject to what will be presently stated) is unlawful (*r*), is founded on the principle that a person "who has an entire duty shall not split the entire sum and distrain for part of it at one time and for other part of it another time, and so *toties quoties* for several times, for that is great oppression" (*s*). And though, as has already been pointed out (*t*), the landlord may *bring an action* to recover any balance of rent if the distress has proved insufficient, he may not vex his tenant by the exercise upon two occasions of the summary remedy of distress (*u*). But a tenant who complains of a distress on the above ground must both plead and prove either that the rent was satisfied by the former distress (*x*), or at all events that it would have been possible to satisfy it from the goods then available but for the landlord's negligence or default (*y*). And the former distress must have been one which was capable of being "worked out" so as to produce satisfaction of the rent (*z*). Hence where a bailiff who had used force to effect

(l) *Johnson v. Upham*, 2 E. & E. 250 (overruling *Ellis v. Taylor*, 8 M. & W. 415).

(m) Under 11 Geo. 2, c. 19, s. 8; *ante*, p. 497.

(n) 11 Geo. 2, c. 19, s. 9; *Owen v. Legh*, 3 B. & A. 470, per Abbott, C. J.

(o) See *Hefford v. Alger*, 1 Taunt. 218.

(p) *Gambrell v. Lord Falmouth*, 4 A. & E. 78.

(q) *Wilton v. Wifen*, 8 L. J. (O. S.) K. B. 303.

(r) See *Wallis v. Savill*, 2 Lutw. 1532; *Owens v. Wynne*, 4 E. & B. 579.

(s) *Hutchins v. Chambers*, 1 Burr. 579, per Lord Mansfield, C. J.

(t) *Ante*, p. 160.

(u) *Bagge v. Mauby*, 8 Exch. 641, per Parke, B.

(x) *Lingham v. Warren*, 2 B. & B. 36; *Hudd v. Ravenor*, *id.*, 662.

(y) *Dawson v. Cropp*, 1 C. B. 961.

(z) See *Bagge v. Mauby*, *ubi sup.*

his entry (a) withdrew after remaining in possession for some days, it was held, following some *dicta* in an earlier case (b), that his acts amounted only to a trespass and as a distress were altogether void (c), that the lessor was not prevented from relying on the illegality, and that a subsequent distress for the same rent was valid (d). This judgment was upheld in the Court of Appeal (e).

The general principle, moreover, is subject to two qualifications: first, where a mistake has been made in the value of the goods on the occasion of the former distress, the landlord fairly supposing them to be of sufficient value and afterwards discovering his error (f); and secondly, where such distress has been abandoned or its fruits lost owing to some act on the part of the tenant. Illustrations of a second distress lawful on this latter ground may be seen where the tenant upon a first distress being levied has requested forbearance or postponement of the proceedings (g)—even if only impliedly, as by making a false statement to the landlord with that object in view (h),—or where he has obtained their withdrawal by entering into an arrangement with the landlord which he fails to carry out (i), or where he has forcibly prevented the removal of goods sold on the first occasion (k). The act, however, which has conduced to this result must have been done by the tenant himself, and not by a mere stranger having legally no interest at the time in the subject-matter of the distress (l). And if the landlord voluntarily abandon (m) the first distress he cannot distrain again (n), unless the ground of abandonment be the

(a) See *ante*, p. 535.

(b) *Attack v. Bramwell*, 3 B. & S. 520.

(c) It seems, however, difficult to see how the Court in the last-mentioned case could have meant this literally, for the bailiff's acts would then have clearly been outside the scope of his employment, and yet damages were awarded against the landlord. See p. 574, *post*.

(d) *Grunnell v. Welch*, [1905] 2 K. B. 650.

(e) *Id.*, [1906] 2 K. B. 555. (No reasons were given by the Court, beyond expressing agreement with the judgments below.) It is believed that the true ground (only incidentally referred to in those judgments) on which the decision will hereafter be supported is that the tenant had himself treated the distress as a mere trespass, first by refusing re-admission to the bailiff after he had temporarily absented himself from the premises, and afterwards by bringing an action to recover damages for the illegal entry. See also pp. 551-2, *ante*.

(f) *Hutchins v. Chambers*, *supra*; *Bagge v. Mawby*, *ubi sup*.

(g) *Bagge v. Mawby*, *supra*, per Parke, B.; *Crosse v. Welch*, 8 T. L. R. 401, 709. A document by which, in consideration of the landlord withdrawing a distress for rent which it admits to be due, the tenant declares that it shall be lawful for him to enter and distrain a second time in case of default, is a mere licence or authority to enter, and does not require a stamp as an agreement: *Hill v. Ramm*, 5 M. & Gr. 789.

(h) See *Wollaston v. Stafford*, 15 C. B. 278.

(i) *Thwaites v. Wilding*, 12 Q. B. Div. 4.

(k) *Lee v. Cooke*, 3 H. & N. 203 (a distress for rates, but the same principle applies).

(l) *Bagge v. Mawby*, 8 Exch. 641.

(m) As to abandonment, see *ante*, p. 537.

(n) *Smith v. Goodwin*, 4 B. & Ad. 413.

insufficiency of the goods available to satisfy his claim (*o*). While the landlord remains in possession under the first distress, *e.g.*, in the case of growing crops until they are ripe (*p*), a second distress will not be unlawful unless levied upon different goods, for such a proceeding is merely nugatory and causes no damage to the person distrained upon (*q*).

(*o*) *Dawson v. Cropp*, 1 C. B. 961.

(*p*) 11 Geo. 2, c. 19, s. 8; *ante*, p. 549.

(*q*) *Lear v. Caldecott*, 4 Q. B. 123.

CHAPTER VIII.

INTERFERENCE WITH DISTRESS.

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It is proposed next to consider the remedies which are given to landlords upon certain acts being committed, the effect of which is either to prevent them from making a distress or to deprive them of its fruits. These remedies, which are now for the most part regulated by statute, *are available both as against the tenant and as against strangers*, and they may be classified according as the act of the offending party is committed before or after the actual time of distress. In the former case (where such act prevents the distress from being levied) the remedy is under the statute relating to *fraudulent removal*; in the latter (where it prevents the distress from being realized) the remedy is for *rescue* or *poundbreach*, according as the act has taken place before or after the impounding of the distress.

Fraudulent removal.—The power conferred by statute (*a*) upon the landlord to follow and seize goods fraudulently removed from the demised premises for the purpose of avoiding a distress, and the conditions which must be fulfilled for the statute to apply, have already been considered (*b*). The statute in question, however, contains further provisions, available against strangers as well as against the tenant, which it is now necessary to notice. To deter the tenant from conveying away his goods, it is provided by sect. 3 that “if any such tenant or lessee shall fraudulently remove and convey away his or her goods or chattels as aforesaid, or if any person or persons shall wilfully and knowingly aid or assist any

(*a*) 11 Geo. 2, c. 19, s. 1.(*b*) *Ante*, pp. 519—521.

such tenant or lessee in such fraudulent conveying away or carrying off of any part of his or her goods or chattels, or in concealing the same, all and every person and persons so offending shall forfeit and pay to the landlord or landlords, lessor or lessors, from whose estate such goods and chattels were fraudulently carried off as aforesaid, double the value of the goods by him, her, or them respectively carried off or concealed as aforesaid, to be recovered by action of debt."

The action, though remedial in so far as it enlarges the landlord's remedy against his tenant (*c*), is a penal action, so that, in compliance with the usual rule in actions of that kind, the plaintiff will not be permitted to obtain discovery by delivering interrogatories to the defendant (*d*), whilst the defendant, on the other hand, may plead not guilty by statute and by so doing put all the facts in issue (*e*). The operation of the above section is confined to cases falling within sect. 1 (*f*), so that it only applies, for instance, where the goods removed are the property of the tenant (*g*), and where the removal has been to benefit *him* (*h*). It is, however, sufficient if the landlord be entitled to distrain at the time the goods are removed (*i*): it is not necessary to prove that a distress was actually in progress, or even that it was contemplated by him (*k*). As against the tenant, his actual participation in the removal is, as already stated (*l*), not necessary if such removal is effected by a third party with his privity (*m*); but if the action be brought against the third party, he must be shown to have actually assisted the tenant, and to have been privy to his fraudulent intent (*n*). The acts and orders of the tenant in such case are admissible evidence of the fraud of the defendant, if by other evidence he is proved to have contributed to the proceeding, and circumstances of suspicion may be brought forward to prove a fraudulent co-operation between them (*o*).

By sect. 4 (*p*), where the goods fraudulently carried off or concealed do not exceed the value of 50*l.*, the landlord or his agent

(*c*) *Brooke v. Noakes*, 8 B. & C. 537, per Bayley, J.

(*d*) *Hobbs v. Hudeon*, 25 Q. B. Div. 232. See *post*, p. 783.

(*e*) *Jones v. Williams*, 4 M. & W. 375. As to this plea, see *post*, p. 575.

(*f*) Per Bayley, J., in *Bach v. Meats*, 5 M. & S. 200; *Brooke v. Noakes*, *supra*.

(*g*) *Tomlinson v. Consolidated Credit Corporation*, 24 Q. B. Div. 135. See p. 521, *ante*.

(*h*) *Bach v. Meats*, *supra*. See p. 520, *ante*.

(*i*) *Ante*, p. 521.

(*k*) *Stanley v. Wharton*, 10 Price, 138

(*l*) *Ante*, p. 520.

(*m*) *Lister v. Brown*, 3 D. & Ry. 501.

(*n*) *Brooke v. Noakes*, *supra*.

(*o*) *Stanley v. Wharton*, *supra*.

(*p*) This section is not set out literally.

may exhibit a complaint in writing against the offender or offenders before two or more justices (*q*) of the county or division, not being interested in the lands whence such goods were removed, who may summon the parties concerned, and after examining witnesses on oath determine in a summary way whether such parties be guilty of the offence charged, inquire in like manner of the value of the goods so fraudulently carried off or concealed, and by order adjudge such parties to pay double their value to the landlord or his agent at such time as the justices shall appoint; and they may also, by warrant under their hands and seals, levy the amount by distress upon the offenders' goods, and failing such satisfaction by imprisonment. The remedy given by this section is merely optional, and does not oust the jurisdiction of the High Court (*r*); nor does the mere fact that a complaint has already been laid under it before the justices make any difference (*s*). It is essential to give the justices jurisdiction that the value of the goods should not exceed 50*l.*, that there should be a complaint in writing, and that the examination should be upon oath: all the rest is for their judgment (*t*).

Jurisdiction under the section may be exercised by justices, either of the county in which the place is situated whence the goods are removed, or of the county in which they are concealed (*u*); and they have power to determine whether the goods have been removed fraudulently or not, even where the property in the demised premises is in dispute and the tenant has paid rent to one of the claimants (*x*). The adjudication of the justices is an order, and not a conviction (*y*), and therefore need not set out the evidence upon which it proceeds (*y*). The order, however, should show that the party removing the goods was the tenant, and the complainant his landlord (*z*), and that the defendant (where he is not the tenant) wilfully and knowingly aided in the removal (*a*): but it need not distinguish between aiding in removal and in concealment of the goods (*b*). And inasmuch as enough must appear on the face of the proceedings to show that the justices have acted within their jurisdiction, it should always state that the complaint was

(*q*) Or a magistrate: 21 & 22 Vict. c. 73, s. 1.

(*r*) *Stanley v. Wharton*, 9 Price, 301; 10 Price, 138; *Bromley v. Holden*, Moo. & M. 175.

(*s*) *Horsefall v. Dary*, 1 Stark. 169.

(*t*) *Coster v. Wilson*, 3 M. & W. 411.

(*u*) *R. v. Morgan*, Cald. 156.

(*x*) *Coster v. Wilson*, *supra*.

(*y*) *R. v. Bissess, Sayer*, 304; *R. v. JJ. of Cheshire*, 5 B. & Ad. 439.

(*z*) *R. v. Davis*, 5 B. & Ad. 551.

(*a*) *R. v. JJ. of Radnorshire*, 9 Dowl. 90.

(*b*) *R. v. Middlehurst*, 1 Burr. 899.

made in writing (*c*). The order should also make it appear that rent was due, but not necessarily when it became due (*d*); nor need it specify when the removal took place (*d*), nor what goods were removed, so long as it sets out, not necessarily in what manner their value has been ascertained (*e*), but what that value really is (*f*).

By sect. 5 an appeal is given from the order of the justices to quarter sessions; and by sect. 6 the justices' order shall not be executed against the party appealing if he enter into a recognizance with one or two surety or sureties in double the sum ordered to be paid. The order cannot be returned to sessions in an amended form, for the party affected by it has the right to appeal against it in the form in which it has been made (*g*); but the right of appeal is now subject to the provisions of the Summary Jurisdiction Acts, 1879 and 1884 (*h*), so that notice of appeal must be given within seven days after the order is made (*i*).

Rescue and Poundbreach.—Rescue or rescous is the forcible taking away, by the owner or other person, of things distrained from the custody of the distrainer,—such taking away being before the impounding but after the distrainer has obtained possession (*k*), and without any abandonment of such possession by him (*l*). Active removal is not necessary, for if the owner of distrained cattle which escape back into his premises while being driven to the pound refuse to re-deliver them to the distrainer upon demand he is guilty of a rescue in law (*m*). Similarly poundbreach—which consists in breaking a pound or any part thereof, or retaking the things distrained *after* they are impounded (*n*),—may be committed without physical interference with the goods, as by granting a replevin (*o*) without authority (*p*). Moreover a poundbreach may be committed by the person in actual possession of the goods distrained for the landlord, if he afterwards deal with them in another capacity. Thus, where, while in possession under a distress, a sheriff's officer upon receiving a *fi. fa.* sold under it

(*c*) *R. v. Fuller*, 2 D. & L. 98 (reported as *Ex parte Fuller*, 13 L. J. M. C. 141).

(*d*) *R. v. Bisscz*, *supra*.

(*e*) *Coster v. Wilson*, 3 M. & W. 411.

(*f*) *R. v. Rabbitts*, 6 D. & Ry. 341.

(*g*) *R. v. JJ. of Cheshire*, 5 B. & Ad. 439.

(*h*) 42 & 43 Vict. c. 49, ss. 31, 32; 47 & 48 Vict. c. 43, ss. 4, 6.

(*i*) *B. v. JJ. of Shropshire*, 6 Q. B. D. 669.

(*k*) *Bullen*, Dist. 244; *Iredale v. Kendall*, 40 L. T. 362.

(*l*) *Dod v. Monger*, 6 Mod. 215. Cf. *Knowles v. Blake*, 5 Bing. 499 (a case of distress damage feasant). As to abandonment, see *ante*, p. 537.

(*m*) Co. Lit. 161 a.

(*n*) *Bullen*, Dist. 244.

(*o*) As to this, see p. 584, *post*.

(*p*) *Trevannian's case*, 11 Mod. 32.

the goods which he had seized for the landlord, it was held that the sheriff was liable for poundbreach (*q*). But where a sheriff's officer seizes goods of which a bailiff is in possession under a distress, the mere fact of preventing their removal from the premises will not render the sheriff liable for poundbreach to the landlord (*r*).

Rescue and poundbreach are both offences at common law (*s*). Rescue, however, may be justified in any case where the distress is unlawful, whether from the fact that no rent was due (*t*), or that the amount due had been tendered (*u*), or that the goods taken were privileged (*x*), or that the distress was made after sunset (*y*), or upon the highway (*z*), or for any similar cause which makes the distress bad *ab initio*, as distinguished from the case of mere excess or irregularity (*a*). And though a poundbreach cannot be justified on a similar ground, inasmuch as after impounding the distress is in the custody of the law (*b*), yet if the distrainer himself take the distress out of the pound for the unlawful (*c*) purpose of using it, the owner may retake possession of it from him without incurring liability for either rescue or poundbreach (*d*).

The remedies which the distrainer may pursue in case of rescue or poundbreach are either (*a*) summary, by recaption, or (*b*) by action.

(*a*) *Recaption*.—The right of recaption upon a rescue only extends to cases where it can be effected without delay ("upon fresh pursuit") and without a breach of the peace (*e*); and though on poundbreach it has been said that the distrainer may take the goods wheresoever he find them and impound them again (*f*), the same limitations seem to apply (*g*).

(*b*) *Action*.—An action lies at common law for a rescue (*h*) or poundbreach (*i*), at the instance, not of the bailiff or poundkeeper,

(*q*) *Reddell v. Stoney*, 2 Moo. & R. 358.

(*r*) *Story v. Finnis*, 6 Exch. 123.

(*s*) Bullen, Dist. 245.

(*t*) *Bevil's case*, 4 Co. 8 a.

(*u*) Co. Lit. 160 b. As to tender, see ante, p. 560.

(*x*) Co. Lit. 161 a.

(*y*) Bullen, Dist. 245.

(*z*) Co. Lit. 160 b.

(*a*) Bullen, Dist. 246.

(*b*) *Cotsworth v. Bettison*, 1 Ld. Ray.

104; Co. Lit. 47 b; 3 Black. Comm. 12. Cp. *Parrett Navigation Co. v. Stower*, 6 M. & W. 564.

(*e*) *Ante*, p. 540.

(*d*) *Smith v. Wright*, 6 H. & N. 821.

(*e*) *Rich v. Woolley*, 7 Bing. 651.

(*f*) Co. Lit. 47 b.

(*g*) See *Turner v. Ford*, 15 M. & W. 212.

(*h*) Bullen, Dist. 247.

(*i*) *Id.*, 248-9.

but of the person in whose right the distress is made (*k*). But trover or trespass cannot be maintained, the distrainer having neither a general nor a special property in, or even the possession of, the distrained goods, which—in the case of poundbreach, at all events—are, as already seen (*l*), in the custody of the law by his act (*m*). The action, however, is usually framed specially on the statute 2 W. & M., sess. 1, c. 5, which provides (*n*) that “upon any poundbreach or rescue of goods or chattels distrained for rent, the person or persons grieved thereby shall . . . recover his and their treble damages and costs of suit against the offender or offenders in any such rescue or poundbreach, any or either of them, or against the owner of the goods distrained in case the same be afterwards found to have come to his use or possession.” The mere fact, however, in a case of poundbreach, that the goods are afterwards found in the possession of a person who has previously claimed to be owner of them is apparently not sufficient to render him liable without proof that the pound was broken by him (*o*). And in order to show that the plaintiff is a “person grieved” within this enactment, it is necessary to establish both that he was the landlord and that rent was in arrear (*p*).

In an action brought upon this statute it is not necessary to allege or prove the notice which must be given to the owner of the goods (*q*) before a sale can take place (*r*). A tender of the rent and expenses after impounding affords no defence to an action upon this section (*s*), because a tender at that stage of the distress does not compel the landlord to release the goods (*t*). Nor does the circumstance that before the action is brought the landlord has recovered damages against his bailiff for his negligence in suffering the goods to be removed in itself provide a defence, though possibly the amount recovered may go in mitigation of the damages accruing from the poundbreach (*u*). The statute, it will be observed, gives the landlord treble costs as well as treble damages (*x*), but these are now replaced by “a full and reasonable

(*k*) Bullen, Dist. 249.

(*l*) *Ante*, p. 540.

(*m*) *R. v. Cotton*, 2 Ves. Sen. 288, per Parker, C. B., at p. 294.

(*n*) Sect. 4.

(*o*) *Castleman v. Hicks*, Car. & M. 266.

(*p*) *Berry v. Huchstable*, 14 Jur. 718.

(*q*) *Ante*, p. 546.

(*r*) *Belasyse v. Burbridge*, 1 Lutw. 213.

(*s*) *Firth v. Purvis*, 5 T. R. 432.

(*t*) See p. 561, *ante*.

(*u*) *Kemp v. Christmas*, 79 L. T. 233, where judgment which had been entered for the defendants was set aside by the C. A., and a new trial granted, on the ground that the plaintiff was at least entitled to nominal damages.

(*x*) *Lawson v. Story*, 1 Ld. Ray. 19.

indemnity (y) as to all costs and charges in and about the action" (z). The action is one of a penal nature, and therefore, in accordance with established rule, the plaintiff cannot obtain discovery by means of an affidavit of documents against the defendant (a).

The enactment giving power to impound a distress on the premises where it is taken (b) provides that "if any poundbreach or rescue shall be made of any goods or chattels or stock distrained for rent and impounded or otherwise secured by virtue of this Act, the person or persons aggrieved thereby shall have the like remedy as in cases of poundbreach or rescue is given and provided by . . . statute" (c); but it seems doubtful whether this applies to the case of a distress made upon the premises of a third party (and there rescued by him) under the statutory provision (d) relating to fraudulent removal (e).

(y) This indemnity is not interfered with by O. 65, r. 1 of the R. S. C. 1883; see *Reeve v. Gibson*, [1891] 1 Q. B. 652, and 53 & 54 Vict. c. 44, s. 5.

(z) 5 & 6 Vict. c. 97, s. 2. This enactment, though included in the schedule to 56 & 57 Vict. c. 61, is not, it is believed, really repealed:—for the expression "in particular there shall be so repealed" in sect. 2 of the last-quoted Act seems clearly to incorporate all the preceding words of the section, and the action now spoken of is not a "proceeding to which this Act (56 & 57 Vict.

c. 61) applies"; and moreover it is not the defendant but the plaintiff who becomes entitled (under 5 & 6 Vict. c. 97, s. 2) to a particular amount of costs.

(a) *Jones v. Jones*, 22 Q. B. D. 425. See *post*, p. 783.

(b) 11 Geo. 2, c. 19, s. 10; *ante*, p. 543.

(c) *Firth v. Purvis*, *supra*. The statute referred to is the 2 W. & M., sess. 1, c. 5 (s. 4), *supra*.

(d) 11 Geo. 2, c. 19, s. 1; *ante*, p. 519.

(e) *Harris v. Thirkell*, 20 L. T. (O. S.) 98.

CHAPTER IX.

WRONGFUL DISTRESS AND ITS REMEDIES.

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A DISTRESS may be wrongful on one of three grounds:—

- (1) It may be wrongful either because there was no right of distress at all (one of the required conditions (a) not being fulfilled, or the right having been lost in one of the ways previously described (b)), or because, there being a right of distress, a wrongful act has been committed *at the beginning* of the levy, *i.e.*, either in the time (c), place (d), or manner (e) of entry, or in the seizure of privileged goods (f). In this case the distress is *illegal*.
- (2) It may be wrongful because, there being a right of distress, a wrongful act has been committed in the seizure of *more* goods than were reasonably necessary to satisfy the claim (g). In this case the distress is *excessive*.
- (3) It may be wrongful because, there being a right of distress, a wrongful act has been committed at some stage of the proceedings subsequent to the seizure (h). In this case the distress is *irregular*.

(a) *Ante*, p. 477.

(b) *Ante*, p. 557.

(c) *Ante*, p. 513.

(d) *Ante*, p. 516.

(e) *Ante*, p. 535.

(f) *Ante*, pp. 494—512.

(g) *Ante*, p. 539.

(h) For instances, see *infra*, p. 579.

The liability of the landlord and the damages recoverable by the tenant, in any particular case of wrongful distress, both depend upon the class into which such wrongful distress falls (*i*).

REMEDIES.

The various remedies (*k*) provided may be considered as follows:—

1. Action for damages.
2. Injunction.
3. Summary proceedings under Agricultural Holdings Act.
4. Summary proceedings under Metropolis Police Courts Act.
5. Summary proceedings under Law of Distress Amendment Act, 1895.
6. Action for double value of goods distrained.
7. Replevin.

(In the case of an *illegal* distress only.)

1. **Action for damages.**—The writ in every case may be indorsed as follows (*l*):—"The plaintiff's claim is for damages for improperly distraining." And in each case it seems clear that the time within which it must be issued, under the Statute of Limitations applicable to the matter, is six years from the cause of action (*m*).

(*a*) **Illegal distress.**—Instances of an illegal distress have just been given (*n*). It has generally been stated (*o*) that though, as will presently appear (*p*), the landlord is liable for irregularities committed by his bailiff in levying a distress, the bailiff alone is liable for his own *illegal* acts; and that in the absence of authority on the part of the landlord to commit the wrongful act, or of ratification after it has been brought to his knowledge, the tenant (except of course in the case where there is no right to distrain at all (*q*))

(*i*) See *infra*, "Action for damages."

(*k*) As to rescue where justifiable, see *ante*, p. 569.

(*l*) R. S. C. 1883, App. A., Pt. III. s. 4.

(*m*) See per Vaughan Williams, L. J., in *Thomson v. Clamorris*, [1900] 1 Ch. 718.

(*n*) *Supra*, p. 572.

(*o*) See, *e.g.*, Bullen & Leake on Pleading, 382 (6th ed.).

(*p*) *Infra*, p. 579.

(*q*) See, *e.g.*, *Smith v. Goodwin*, 4 B. & Ad. 413. The person, too, actually authorizing the bailiff may be liable, even though only an agent of the landlord: *Bennett v. Bayes*, 5 H. & N. 391; *Serjeant v. Nash*, [1903] 2 K. B. 304 (case of solicitors).

has no cause of action against him (*r*). The question, however, of the landlord's real liability has not perhaps yet received adequate consideration. That liability—which is regulated by the general law of principal and agent—extends of course only to acts within the scope of the bailiff's employment. Now the warrant of distress (*s*), which is the authority under which he acts, ordinarily directs him to seize goods and chattels which may be found on specified premises the subject of the demise. If, then, the act complained of is clearly *dehors* the employment altogether, as where the seizure is made off the designated premises (*t*), or where it is made not on goods at all but on fixtures (*u*), the landlord cannot be made liable. But where this is not the case, as where the bailiff is guilty of want of ordinary care or skill in carrying out the work intrusted to him, or even of an act of wilful misbehaviour if committed in his employer's interest, it is submitted that the latter on general principles is responsible (*x*). Thus where the bailiff in executing the warrant seizes goods which, though really chattels, are privileged from distress, the landlord has more than once been held liable (*y*). On the other hand, it appears to have been held that the landlord cannot be made responsible for the act of his bailiff in entering to distrain in an unlawful manner (*z*); but the distinction involved is not perhaps easy to appreciate, and although the case seems one "near the line" (*a*), it is thought that the decision (for which no reasons are given) cannot be regarded as correct (*b*). The opinion has already been expressed (*c*) that the

(*r*) See per Farwell, L. J., in *Lowe v. Dorting*, [1906] 2 K. B. at p. 783, and *dicta* in judgments below, [1905] 2 K. B. 501.

(*s*) *Ante*, p. 533. See form in Bullen, Dist. 150.

(*t*) *Lewis v. Read*, 13 M. & W. 834, per Parke, B.

(*u*) *Freeman v. Roshier*, 13 Q. B. 780, explained in *Haseler v. Lemoyne*, 5 C. B. N. S. 530, per Williams, J., at p. 533. Cp. too the judgment of Byles, J., in the latter case.

(*x*) It is thought that a bailiff cannot properly be regarded as an "independent contractor," so as to exempt the landlord from liability for what are sometimes called his "casual" or "collateral" acts of negligence: see Addison on Torts, p. 321 (8th ed.).

(*y*) *Hurry v. Rickman*, 1 Moo. & R. 126 (where Littledale, J., seems to have thought—it is submitted with doubtful

correctness—that the landlord might rid himself of his liability by repudiating the wrongful act); *Gauntlett v. King*, 3 C. B. N. S. 59. (See the remark on this case, *ante*, p. 511, note (*o*).)

(*z*) *Green v. Wroe*, W. N. 1877, p. 130.

(*a*) In *Attack v. Bramwell*, 3 B. & S. 520, where under similar circumstances the landlord was held liable, the point does not appear to have been even taken. And the same remark applies to *American, &c., Must Corporation v. Hendry*, 62 L. J. Q. B. 388 (C. A.), where superior landlords were held liable for the illegal entry of their bailiff.

(*b*) It should also be noticed that in *Freeman v. Roshier*, *supra*, the real point decided was that the landlord was not liable *in trespass*; and the Court appear to have recognised that that was by no means the same thing as holding that he was not liable at all: see at p. 788 of the report.

(*c*) *Ante*, p. 533.

landlord's liability, where it exists, is unaffected by the fact that at the present day bailiffs are required to have certificates of fitness from the county court.

Moreover, his liability, as just stated, may arise from ratification express or implied. Thus his presence on the demised premises at or immediately after the time the wrongful act has been committed affords evidence that he has assented to it (*d*). On the other hand, the mere fact that he has received the proceeds of the distress (it not being shown that *at that time* he had any knowledge of the unlawful act) is not sufficient to make him liable in this action (*e*); but where he must have had knowledge of the illegality (as where he detains goods which have been seized though privileged from distress), he will be liable as upon a ratification (*f*). And such liability will also follow if it be shown that he meant to take upon himself, without inquiry, the risk of any irregularity which the bailiff might have committed, and to adopt all his acts (*g*); for the intention to adopt an act at all events is the same as adopting it with knowledge (*h*).

By 11 Geo. 2, c. 19, in any actions "brought against any person or persons entitled to rents or services of any kind, his, her, or their bailiff or receiver, or other person or persons, relating to any entry, by virtue of this Act or otherwise, upon the premises chargeable with such rents or services, or to any distress or seizure, sale or disposal, of any goods or chattels thereupon," the defendant may plead not guilty by statute (*i*),—a right which is preserved to him under the present practice, with this qualification, that no other defence may be pleaded at the same time, except by leave of the Court (*k*). This plea, which it is only optional in the landlord to avail himself of (*l*), puts in issue, not only the matter of justification, but the tenancy and ownership of the goods (*m*).

The above section (which in addition gives to the defendant double costs, now replaced by a full indemnity (*n*) for all costs (*o*),

(*d*) *Moore v. Drinkwater*, 1 F. & F. 134.

(*e*) *Freeman v. Roshier*, 13 Q. B. 780; *Green v. Wroe*, *supra*.

(*f*) *Gauntlett v. King*, *supra*.

(*g*) *Lewis v. Read*, *supra*.

(*h*) *Freeman v. Roshier*, *supra*. Referring a complaining party to a solicitor for the acceptance of process is an example: *Carter v. Vestry of Kensington*, 64 J. P. 548 (a distress for rates).

(*i*) Sect. 21.

(*k*) R. S. C. 1883, O. 19, r. 12. The defendant must insert in the margin of his pleading the following words: "By statute 11 Geo. 2, c. 19, s. 21 (Public Act)"; R. S. C. 1883, O. 21, r. 19.

(*l*) *Gambrell v. Lord Falmouth*, 5 A. & E. 408.

(*m*) *Williams v. Jones*, 11 A. & E. 648.

(*n*) Such indemnity may be recovered, though the defendant has not pleaded in the way allowed by the statute: *Gambrell v. Lord Falmouth*, *supra*.

(*o*) See *ante*, p. 571, note (*e*).

upon the plaintiff discontinuing the action or having judgment against him) applies, as will have been noticed, in terms to entry and to "any distress or seizure" generally, and consequently regulates actions for illegal, as well as for excessive or irregular, distress(*p*). But it only applies to distresses made upon the premises chargeable with the rent(*q*), and therefore cannot be taken advantage of by a landlord who justifies an alleged illegal distress on the ground of fraudulent removal(*r*) of the goods(*s*).

The damages recoverable in this action, where the goods have been removed and sold, are their full value(*t*). Where the distress, however, is withdrawn on payment of the rent before the goods are removed, the tenant, who may sue in trover(*u*), can only recover the actual damage he has sustained(*x*), so that the damages in this case will often be merely nominal(*y*); and where privileged goods are taken together with others he can, on the distress being withdrawn by reason of payment of the rent due, only recover the actual damage sustained by the taking of the privileged goods(*z*). On the other hand, it makes no difference to the tenant's power to recover damages that he has only a qualified property (*e.g.*, that of a pledgee) in them(*a*). Nor is any deduction to be made in respect of rent which has remained unpaid(*b*); though the landlord could now recover such rent by counterclaim(*c*). An opinion has been intimated that in a proper case damages for annoyance and loss of credit and reputation in trade might be recovered in an action for illegal distress(*d*).

In the case of an illegal distress, moreover, the tenant or owner of the goods may perhaps sue in trover any purchaser or person into whose hands they may have come, as having taken property by assignment(*e*) from a person who had no right to dispose of it(*f*).

(*b*) *Excessive distress*.—If more goods are seized than are necessary to satisfy the rent due with the expenses, the remedy, founded

(*p*) See, *e.g.*, *Attack v. Bramwell*, 3 B. & S. 520; *Lyons v. Elliott*, 1 Q. B. D. 210; *Crosse v. Welch*, 8 T. L. R. 401, 709.

(*q*) *Vaughan v. Davis*, 1 Esp. 257.

(*r*) *Ante*, p. 519.

(*s*) *Furneaux v. Fotherby*, 4 Camp. 136; *Postman v. Harrell*, 6 C. & P. 225.

(*t*) *Keen v. Priest*, 4 H. & N. 236.

(*u*) *Shipwick v. Blanchard*, 6 T. R. 298.

(*z*) *Lamb v. Wall*, 1 F. & F. 503.

(*y*) *Hogarth v. Jennings*, [1892] 1 Q. B. 907.

(*s*) *Harvey v. Pocock*, 11 M. & W. 740.

(*a*) *Swire v. Leach*, 18 C. B. N. S. 479.

(*b*) *Attack v. Bramwell*, 3 B. & S. 520

(*c*) R. S. C. 1883, O. 19, r. 3.

(*d*) See per Charles, J., *Smith v. Enright*, 63 L. J. Q. B. 220. But see *infra*, p. 590, note (*t*).

(*e*) See Roscoe, N. P. 959 (17th ed.).

(*f*) *Sed qu.* See *ante*, p. 551.

on the Statute of Marlebridge (*g*), is by action for excessive distress. Such action lies for an excessive distress of growing crops (*h*), the probable produce of which is capable of being estimated at the time of seizure (*i*). All that is required, however, from the distrainer in making the seizure is that a reasonable and honest discretion should have been exercised (*k*): and in exercising it the value of the goods should be estimated according to what they would realize at a sale by auction (*l*), and not their value to the tenant or the price that would be paid by an incoming tenant for them (*m*). It has already been stated (*n*) that an appraisement (where resorted to) is not conclusive as against the tenant as to their real value (*o*), for the inquiry is always open whether the best means have been taken to ascertain what that value is (*p*).

Whether a distress is excessive or not is a question of fact for a jury (*q*), and the circumstance that goods distrained did not actually realize the amount of the rent and expenses is not in itself conclusive that it was not excessive (*q*), as they may not have been sold for the best price. On the other hand, the mere sale at an under-value, though giving a distinct cause of action (*r*), does not necessarily show that the distress was excessive (*s*). Where there is only a single chattel on the premises which can be seized in order to make the distress effectual, the fact that it is of considerably greater value than the amount to be satisfied will not make the distress excessive if it be taken (*t*).

Although, as already stated (*u*), no action will lie for the mere act of distraining upon a claim of too much rent, yet as soon as more goods are seized than are necessary to satisfy what is really due, a cause of action arises under this head (*x*). Thus, the fact of no sale having taken place, either from the tenant paying the amount due (*y*), or from an arrangement being arrived at between the parties (*z*), will not divest the tenant of his right of action (*a*), even if the goods seized have not been withdrawn from his

(*g*) 52 Hen. 3, c. 4.

(*h*) Made under 11 Geo. 2, c. 19, s. 8; *ante*, p. 497.

(*i*) *Piggott v. Birtles*, 1 M. & W. 441.

(*k*) *Roden v. Eyton*, 6 C. B. 427, per Wilde, C. J. (a distress for tithes).

(*l*) *Rayley v. Taylor*, C. & E. 150, Cave, J.

(*m*) *Wells v. Moody*, 7 C. & P. 59.

(*n*) *Ante*, p. 548.

(*o*) *Cook v. Corbett*, 24 W. R. 181.

(*p*) *Clarke v. Holford*, 2 C. & K. 540.

F.

(*q*) *Smith v. Ashforth*, 29 L. J. Ex. 259.

(*r*) *Ante*, p. 552.

(*s*) *Thompson v. Wood*, 4 Q. B. 493.

(*t*) *Field v. Mitchell*, 6 Esp. 71; *Avenell v. Croker*, Moo. & M. 172.

(*u*) *Ante*, p. 547.

(*x*) *Crowder v. Self*, 2 Moo. & R. 190.

(*y*) *Chandler v. Doulton*, 3 H. & C. 558.

(*z*) *Sells v. Hoare*, 1 Bing. 401; *Willoughby v. Backhouse*, 2 B. & C. 821.

(*a*) As to damages, see p. 578, *infra*.

control (*b*). (But an action by the landlord to enforce such an arrangement will not be defeated by a plea of duress of goods by reason of the excessive distress (*c*).) A recovery, however, in an action of replevin (*d*) is a bar to the action, because the tenant has, by proceeding in that way, elected to treat the distress as *illegal* (*e*); but this does not apply where the proceedings in replevin have been stayed by consent (*f*).

The action may be brought either by the tenant himself (*g*), or by the owner of the goods seized (*h*), or even by any person having the mere enjoyment of their use, though having no property either legal or equitable in them (*i*); and, on the other hand, it may be brought not only against the bailiff but against the landlord (*k*).

The defendant in this action may, in the same way and subject to the same limitation as in the case of an illegal distress (*l*), plead not guilty by statute, and recover an indemnity for his costs if he succeed (*m*).

The damages recoverable in an action for excessive distress are (after deducting the rent and expenses) the real value of the goods (*n*); but if no sale of them has taken place, the tenant will only be able to recover in respect of the inconvenience and expense which he has sustained in being deprived of their use, or (if he has replevied them (*o*)) of the additional expense of procuring sureties to a larger amount than would otherwise have been required (*p*). Hence even where the goods have not been sold, he will be entitled to recover at least nominal damages (*q*). Where only part of the goods distrained belong to the plaintiff, the general rule is that he can recover in proportion to the value that his goods bear to all the goods distrained (*r*).

(*b*) *Baylis v. Usher*, 4 M. & P. 790 (reported imperfectly as *Bayliss v. Fisher*, 7 Bing. 153).

(*c*) *Sheate v. Beale*, 11 A. & E. 983. Cp. *Knibbs v. Hall*, 1 Esp. 84, where it was held (it is thought wrongly) that if a tenant paid under a threat of distress more rent than was really due, he could not sue to recover it. See Bullen, Dist. 224; 2 Sm. L. C. 432 (11th ed.).

(*d*) *Infra*, p. 589.

(*e*) *Phillips v. Berryman*, 3 Doug. 286.

(*f*) *Grace v. Morgan*, 2 Bing. N. C. 534.

(*g*) Cases under this head, *passim*.

(*h*) *Fisher v. Algar*, 2 C. & P. 374; *Wilkinson v. Ibbett*, 2 F. & F. 300.

(*i*) *Fell v. Whittaker*, L. R. 7 Q. B. 120.

(*k*) *Megson v. Mapleton*, 49 L. T. 744, per Mathew, J.

(*l*) See, on this point, *supra*, p. 575.

(*m*) 11 Geo. 2, c. 19, s. 21; 5 & 6 Vict. c. 97, s. 2. See *ante*, p. 571.

(*n*) *Wells v. Moody*, 7 C. & P. 59.

(*o*) This he can only do if the distress, besides being excessive, is also (as in the case next cited) in part at least illegal; see p. 584, *infra*.

(*p*) See *Piggott v. Birtles*, 1 M. & W. 441.

(*q*) *Chandler v. Doulton*, 3 H. & C. 553.

(*r*) *Bail v. Mellor*, 19 L. J. Ex. 279, per Parke, B.

In the case of an excessive distress the tenant cannot sue in trover purchasers or persons into whose possession the goods have come (*s*).

(*c*) *Irregular distress*.—As has already been stated (*t*), a distress is irregular where the right to distrain exists, but some wrongful act has been committed at some stage of the proceedings subsequent to the seizure. Several examples have already been given: selling without giving notice of the distress (*u*), or where the notice is imperfect (*x*), or without appraisement (where appraisement is required) (*y*), or without waiting the full time necessary (*z*), or without obtaining the best price (*a*), or without dealing with the overplus in the prescribed manner (*b*), are instances in point. As in the last case, the action may be brought by the owner of the goods whether the tenant (*c*) or not (*d*), and will lie not merely against the bailiff but against his employer (*e*); nor does it make any difference that the latter has not authorized the distress at all (*f*), if he ratify it afterwards (*e*).

In the same way as in the last case, also, the defendant in this action is entitled by special provisions to plead not guilty by statute, and to recover if successful an indemnity for his costs (*g*); whilst the plaintiff can recover the special damage he may have sustained by the irregularity complained of, and no more (*h*). It follows that though, where such damage has accrued, he will be entitled to recover the real value of the goods (*i.e.*, their full value to him (*i*)), less the rent and expenses (*k*), where no actual damage can be proved to have resulted he will fail in the action altogether (*l*).

And, as in the last case, the tenant cannot sue in trover persons who have acquired by purchase or otherwise possession of the goods, for, as already stated, a mere irregularity in the distress

(*s*) *Whitworth v. Smith*, 5 C. & P. 250.

(*t*) *Supra*, p. 572.

(*u*) *Ante*, pp. 545, 546.

(*x*) *Ante*, p. 547.

(*y*) *Ante*, p. 548.

(*z*) *Ante*, pp. 549, 550.

(*a*) *Ante*, p. 552.

(*b*) *Ante*, p. 552.

(*c*) Cases under this head, *passim*.

(*d*) *Kerby v. Harding*, 6 Exch. 234.

(*e*) *Haseler v. Lemoyne*, 5 C. B. N. S. 530. See p. 574, *supra*.

(*f*) As to the necessity for some evidence of authority, see *Crabb v. Killick*, 6 C. & P. 216.

(*g*) 11 Geo. 2, c. 19, s. 21, and 5 & 6 Vict. c. 97, s. 2. See as to this latter provision, p. 571, *ante*.

(*h*) 11 Geo. 2, c. 19, s. 19; as to which, and as to tender of amends, see sect. 20, *infra*, p. 580.

(*i*) *Roche v. Hille*, 3 T. L. R. 298.

(*k*) *Biggins v. Goode*, 2 C. & J. 364; *Knight v. Egerton*, 7 Exch. 407; *Knolls v. Curtis*, 5 C. & P. 322; *Whitworth v. Maden*, 2 C. & K. 517.

(*l*) *Rodgers v. Parker*, 18 C. B. 112 (reported as *Rogers v. Parker*, 25 L. J. C. P. 220); *Lucas v. Tarleton*, 3 H. & N. 116.

proceedings (short of one which makes the sale altogether void) will not entail the result of depriving the purchaser of a good title to them (*m*).

Formerly, any wrongful act in levying a distress otherwise lawful made the distrainer a trespasser *ab initio* (*n*). But this has been altered by 11 Geo. 2, c. 19, s. 19, which enacts that "where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining, or by his, her, or their agents, the distress itself shall not be therefore deemed to be unlawful, nor the party or parties making it be deemed a trespasser or trespassers *ab initio*; but the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he, she, or they shall have sustained thereby, and no more . . . provided always that where the plaintiff or plaintiffs shall recover in such action he, she, or they shall be paid his, her, or their full costs (*o*) of suit, and have all the like remedies for the same as in other cases of costs." And it is further provided (*p*) that they shall not recover in such action "if tender of amends has been made by the party or parties distraining, his, her, or their agent or agents, before such action brought."

2. Injunction.—An injunction may now be granted by an interlocutory order of the Court "in all cases in which it shall appear to the Court to be just or convenient that such order should be made" (*q*). Where the tenant complains of a distress as wrongful (*r*), or where he is merely apprehensive that a distress which he alleges to be wrongful will be levied (*s*), he may apply under the above rule to have the distress restrained till the question whether it is wrongful or not can be tried. But though the Court may grant the injunction unconditionally (*t*), it is believed that no case has yet occurred in which the tenant has not been ordered to bring the rent into Court as a condition of its being granted (*u*); for the Court will not, as a rule, interfere for the purpose of preventing a party from enforcing a legal claim, without securing to itself the means of putting him in the same

(*m*) *Ante*, p. 551.

(*n*) See *The Six Carpenters' case*, 8 Co. 146 s.; 1 Sm. L. C. 132 (11th ed.).

(*o*) See *infra*, p. 583.

(*p*) 11 Geo. 2, c. 19, s. 20.

(*q*) Jud. Act, 1873, s. 25, sub-s. 8.

(*r*) *Walsh v. Lonsdale*, 21 Ch. Div. 9.

(*s*) *Shaw v. Jersey (Lord)*, 4 C. P. D. 120; affirmed on appeal, 4 C. P. Div. 359.

(*t*) *Id.*, per Brett, L. J.

(*u*) Cases last cited.

position, in the event of his turning out to be right, as if it had not interfered (x). And the party applying to have a distress restrained by injunction must at all events make out a *prima facie* case for relief (y).

3. Proceedings under the Agricultural Holdings Act.—Where the tenancy is one to which the Agricultural Holdings Act (z) applies (a), a summary remedy for wrongful distress is conferred by that Act. By sect. 46, “where any dispute arises (a) in respect of any distress having been levied contrary to the provisions of this Act (b); or (b) as to the ownership of any live stock distrained, or as to the price to be paid for the feeding of such stock (c); or (c) as to any other matter or thing relating to a distress on a holding to which this Act applies (d);—such dispute may be heard and determined by the County Court (e), or by a Court of summary jurisdiction, and any such County Court or Court of summary jurisdiction may make an order for restoration of any live stock or things unlawfully distrained, or may declare the price agreed to be paid in the case where the price of the feeding is required to be ascertained (f), or may make any other order which justice requires; any such dispute as mentioned in this section shall be deemed to be a matter in which a Court of summary jurisdiction has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Acts; but any person aggrieved by any decision of such Court of summary jurisdiction under this section may, on giving such security to the other party as the Court may think just, appeal to a Court of general or quarter sessions.” And it is further provided (g) that “an order of the County Court or of a Court of summary jurisdiction under this Act shall not be quashed for want of form, or be removed by certiorari or otherwise into any superior Court.”

The fact that sect. 46 provides a procedure by way of appeal from a Court of summary jurisdiction only does not prevent an appeal from lying from the decision of the County Court if that

(x) *Sanzler v. Foster*, Cr. & Ph. 302, per Lord Cottenham, L. C.

(y) *Carter v. Salmon*, 43 L. T. 490, per Cotton, L. J.

(z) 46 & 47 Vict. c. 61.

(a) See ss. 54, 61, *post*, p. 728.

(b) *Ante*, pp. 503, 511, 522, 558.

(c) *Ante*, p. 512.

(d) See ss. 54, 61.

(e) Defined in sect. 61; *post*, p. 745. The proceedings are by action commenced by plaint and summons in the ordinary way, particulars of demand being filed which should state concisely the nature of the dispute and the order claimed: C. C. R. 1903, O. 40, r. 8.

(f) *Ante*, p. 512.

(g) Sect. 48.

tribunal be resorted to (*h*); the right of appeal from that tribunal is now regulated by sect. 120 of the County Courts Act, 1888 (*i*), and it seems that under that section the appeal—on a question of law—will lie (*k*).

4. Summary proceedings under the Metropolis Police Courts Act.—By stat. 2 & 3 Vict. c. 71, it is provided as follows (*l*):—“On complaint made to any of the . . . magistrates” appointed under that Act “by any person who shall, within the metropolitan police district (*m*), have occupied any house or lodging by the week or month, or whereof the rent does not exceed the rate of 15*l.* by the year, that his goods have been taken from him by an unlawful distress, or that the landlord, or his broker or agent, has been guilty of any irregularity or excess in respect of such distress, it shall be lawful for such magistrate to summon the party complained against; and if upon the hearing of the matter it shall appear to the magistrate that such distress was improperly taken, or unfairly disposed of, or that the charges made by the party having distrained or having attempted to distrain are contrary to law, or that the proceeds of the sale of such distress have not been duly accounted for to the owner thereof, it shall be lawful for the magistrate to order the distress so taken, if not sold, to be returned to the tenant on payment of the rent which shall appear to be due, at such time as the magistrate shall appoint; or if the distress shall have been sold, then to order payment to the said tenant of the value thereof, deducting thereout the rent which shall so appear to be due, such value to be determined by the magistrate; and such landlord or party complained against, in default of compliance with any such order, shall forfeit to the party aggrieved the value of such distress, not being greater than 15*l.*, such value to be determined by the magistrate.”

This enactment, as will have been noticed, applies to all weekly and monthly tenancies irrespective of the amount of the rent, while in other tenancies the amount must not exceed the stipulated limit.

(*h*) See *Hanmer v. King*, 57 L. T. 367.

(*i*) 51 & 52 Vict. c. 43. It may be excluded by a written agreement between the parties: sect. 123.

(*k*) See Ann. Cty. Ct. Prac., Part 7, Ch. 2, citing *The Delano*, [1895] P. 40. As to the procedure to be adopted on

the appeal, see R. S. C. 1883, O. 59, and 57 & 58 Vict. c. 16, s. 1 (5).

(*l*) Sect. 39.

(*m*) Defined (see sect. 55) by 10 Geo. 4, c. 44, s. 4 (and sched.), as amended by 2 & 3 Vict. c. 47, s. 2.

5. Summary remedy under Law of Distress Amendment Act, 1895.—By the Law of Distress Amendment Act, 1895 (*n*), it is enacted that “a Court of summary jurisdiction, on complaint that goods or chattels exempt under sect. 4 of the Law of Distress Amendment Act, 1888 (*o*), from distress for rent have been taken under such distress, may, by summary order, direct that the goods and chattels so taken, if not sold, be restored; or, if they have been sold, that such sum as the Court may determine to be the value thereof shall be paid to the complainant by the person who levied the distress or directed it to be levied.”

6. Action for double value of goods distrained.—This remedy, as has been stated (*p*), applies only to the case of an *illegal* distress, and only to the particular sort of illegality which arises from the fact of the distress (where it has been followed by a sale of the goods and chattels seized) having been made when no rent was in arrear and due to the person by whom or on whose behalf it was levied. In such cases, the Act 2 W. & M. seas. 1, c. 5, sect. 5, provides that “the owner of such goods or chattels distrained and sold . . . his executors or administrators shall and may, by action . . . to be brought against the person or persons so distraining, any or either of them, his or their executors or administrators, recover double of the value of the goods or chattels so distrained and sold together with full costs of suit.” This latter expression, however, does not give more than the usual costs (*q*) as between party and party (*r*).

The above provision is absolute, so that if such action be brought successfully less damages than the double value of the goods cannot be given (*s*). The only person empowered by it to sue is, as will be noticed, the owner of the goods (*t*). The section has been held to apply in a case where goods were distrained after judgment had been obtained in an action brought for the rent, though such judgment had not been satisfied (*u*).

The writ may be indorsed according to the form already given (*x*).

(*n*) 58 & 59 Vict. c. 24, s. 4.

(*o*) 51 & 52 Vict. c. 21; *ante*, p. 502.

(*p*) *Supra*, p. 573.

(*q*) Such costs are not interfered with by O. 65, r. 1 of the R. S. C. 1883. See *Reeve v. Gibson*, [1891] 1 Q. B. 652, and 53 & 54 Vict. c. 44, s. 5.

(*r*) See *Avery v. Wood*, [1891] 3 Ch. 115.

(*s*) *Masters v. Farris*, 1 C. B. 715.

(*t*) *Chancellor v. Webster*, 9 T. L. R. 568.

(*u*) *Potter v. Bradley*, 10 T. L. R. 445. See p. 557, *ante*.

(*x*) *Supra*, p. 573; R. S. C. 1883, App. A., Pt. III, s. 4.

7. **Replevin.**—This remedy, like the preceding one, is applicable only to the case where the distress is *illegal*, for it requires that there should have been a wrongful taking of the goods distrained originally (*y*); and its object is to procure not a compensation in damages but the restoration of the goods themselves (*z*). Thus it lies, for example, where there was no relationship of landlord and tenant existing at all (*a*), or where there was no demise at a fixed rent (*b*), or where no rent was due (*c*), or none due to the person who has distrained (*d*), or where it was released before the distress (*e*), or where it was tendered before the impounding (*f*), or where the entry was illegal (*g*), or where things privileged from distress have been seized (*h*); but it only applies to goods and cattle (*i*), so that if, for instance, animals *feræ naturæ* (*k*), or fixtures (*l*), be taken, this remedy cannot be resorted to. Nor will it lie if any part of the rent claimed was due (*m*), for the distress (apart from wrongful entry or seizure) is not in such case illegal (*n*). Where in an action of replevin the only rent claimed by the landlord was not recoverable by distress, the fact that other rent was owing for which a distress might have been levied was held to furnish no answer (*o*).

Replevin is the name given to the process by which the owner of goods distrained obtains their re-delivery upon giving security to try, in an action to be brought subsequently by him, the right of distress, and to restore them if such right be adjudged against him (*p*). This process, as will be observed, consists of two independent parts: first, the *replevy*, i.e., the process to obtain the re-delivery of the goods themselves; and secondly, the *action of replevin*, in which the right to them is tried. As will be seen presently, in the first the County Court of the district in which the goods have been taken has exclusive jurisdiction, while in the second it has a jurisdiction concurrent with the High Court.

The proceedings may be brought, as just stated, *by* the owner

(*y*) See *Mennie v. Blake*, 6 E. & B. 842, per Coleridge, J.

(*z*) *Id.* See, as to damages, *infra*, p. 590.

(*a*) *Walker v. Giles*, 6 C. B. 662. (See as to this case *ante*, p. 464.)

(*b*) *Hegan v. Johnson*, 2 Taunt. 148; *Dunk v. Hunter*, 5 B. & A. 322; *Regnart v. Porter*, 7 Bing. 451; *ante*, p. 479.

(*c*) *Davis v. Gyde*, 2 A. & E. 623.

(*d*) *Downs v. Cooper*, 2 Q. B. 256.

(*e*) *Cooper v. Robinson*, 10 M. & W. 694.

(*f*) *Evans v. Elliott*, 5 A. & E. 142.

(*g*) *Tunncliffe v. Wilmot*, 2 C. & K. 626.

(*h*) *Eaton v. Southby*, Willes, 131.

(*i*) Co. Lit. 145 b.

(*k*) Bac. Ab. Replevin (F.).

(*l*) *Gibbs v. Crisshank*, L. R. 8 C. P. 454, per Keating, J.

(*m*) See *White v. Greenish*, 11 C. B. N. S. 209.

(*n*) *Supra*, p. 572.

(*o*) *Roskrug v. Cuddy*, 7 Exch. 840.

(*p*) *Bullen*, Dist. 277.

of the goods (*i.e.*, the person who is owner at the time they are seized (*q*)), whether the tenant or not (*r*); and for this purpose a special property in them (*e.g.*, that of a pledgee) is sufficient (*s*), but not, as it would seem, a mere possessory right (*t*). An executor may sue in replevin in respect of his testator's goods (*u*). Parties having a joint interest in the goods distrained may join in the action (*x*), but persons cannot join in one replevin merely because goods belonging to them severally have been taken together (*y*).

On the other hand, the proceedings may be brought *against* either the bailiff or the landlord (if he has authorized the distress (*z*)) or both (*a*). They will also, as it appears, lie against a corporation (*b*).

The question *within what time* proceedings may be commenced has already been discussed (*c*); and it has been stated that the tenant or owner of the goods has for that purpose at least five days (which he may now extend to fifteen) after receiving notice of the distress, and that, until the goods are actually sold, neither the act of appraisement nor the removal of them from the premises deprives him of his right to replevy them (*d*). But the Statute of Limitations specifies (amongst others) actions of replevin, and provides that they shall be brought within six years next after the cause of action (*e*).

A. *The replevy*.—This, the first of the two stages of proceedings in replevin, is now regulated by the County Courts Act, 1888 (*f*), which provides (*g*) that the registrar of the Court (*h*) of the district in which the goods have been taken shall be empowered to issue all necessary process (to be executed by the bailiff of the Court) in relation to replevin, and that he shall, at the instance of the party whose goods have been seized, cause the same to be replevied to him on his giving security, to be approved by the registrar, for such an amount as the latter shall deem sufficient to cover the alleged

(*q*) Co. Lit. 145 b.

(*r*) *Peacock v. Purvis*, 2 B. & B. 362; *Fenton v. Logan*, 9 Bing. 646; and see 51 & 52 Vict. c. 43, s. 134, cited under the next head.

(*s*) Co. Lit. 145 b.

(*t*) *Templeman v. Case*, 10 Mod. 24. In the action for excessive distress this has been seen to be otherwise: *supra*, p. 578.

(*u*) *Arundell v. Trevill*, 1 Sid. 81.

(*x*) Bullen, Dist. 278.

(*y*) Co. Lit. 145 b.

(*z*) See pp. 573—575, *supra*.

(*a*) Bullen, Dist. 279.

(*b*) *Clerk v. Mayor of Berrwick*, 4 B. & C. 649.

(*c*) *Ante*, pp. 545, 546.

(*d*) *Jacob v. King*, 5 Taunt. 451; *ante*, p. 551.

(*e*) 21 Jac. 1, c. 16, s. 3.

(*f*) 51 & 52 Vict. c. 43.

(*g*) Sect. 134.

(*h*) In substitution for the sheriff, in whom these powers were formerly vested.

rent in respect of which the distress was made, and the probable costs of the subsequent action of replevin. The security is conditioned to commence such action, at the option of the plaintiff, either in the County Court of the district (in which case he must commence it within a month from the date of the security (*g*)), or in the High Court (in which case he must commence it within a week, and further undertake to prove before the High Court, unless he obtain judgment by default, that he had good ground for believing that the alleged rent exceeded 20*l.*, or that the title to some corporeal or incorporeal hereditament the rent or value whereof exceeded 20*l.* by the year, or to some toll, market, fair, or franchise, was in question (*k*)). In both cases, moreover, the security is conditioned to prosecute such action with effect and without delay, and to make return of the goods if a return thereof should be adjudged (*l*).

Prosecution of the action "with effect" means bringing it to a successful termination (*m*); but it will be a good answer to an alleged breach of this obligation to show, either that proceedings in the suit have been interrupted by the act of God, *e.g.*, by the death of the replevisor (*n*), or that they are still pending (*o*), the burden of proving their termination being thrown in this case on the other party (*p*). The action, however, must also be prosecuted "without delay," *i.e.*, it must be carried on with due diligence (*q*); the lapse of a considerable interval without proceeding is a breach of the condition (*r*), and the mere fact that the time allowed for proceedings in the ordinary practice of the Court has not been exceeded will not prevent the condition from being regarded as broken, if the delay which has arisen has caused prejudice to the other party (*s*).

The security required by the above provisions from the replevisor may at his option be given in either of two ways,—in the form of a bond with sureties to the other party (*t*), or in that of a deposit with the registrar of the sum for which security is required, together with a memorandum to be approved by him, and to be signed by the replevisor, his solicitor or agent, setting forth the

(*g*) Sect. 136.

(*k*) Sect. 135.

(*l*) Sects. 135, 136.

(*m*) *Morgan v. Griffith*, 7 Mod. 380; *Perreau v. Bevan*, 5 B. & C. 284; *Jackson v. Hanson*, 8 M. & W. 477.

(*n*) *Morris v. Matthews*, 2 Q. B. 293.

(*o*) *Harrison v. Wardle*, 5 B. & Ad. 146, per Parke, J.

(*p*) *Brackenbury v. Poll*, 12 East, 585.

(*q*) *Harrison v. Wardle*, *supra*.

(*r*) *Azford v. Perrett*, 4 Bing. 586. The interval here was one of two years.

(*s*) *Gent v. Cutts*, 11 Q. B. 288.

(*t*) 51 & 52 Vict. c. 43, s. 108. For form of bond, see County Court Rules, 1903, App., Nos. 287, 288.

conditions on which the money is deposited (*u*). In the *former* case (that of a bond (*x*)), the replevisor must serve, by post or otherwise, on the other party, and on the registrar at his office, notice of the proposed sureties (*y*); and the registrar forthwith gives notice to both parties (*z*) of the day and hour on which he proposes that the bond shall be executed, stating in the notice to the obligee (*a*) that any valid objection which he may have to make to the sureties, or either of them, must be made on that day (*b*). The sureties must, unless the other party dispense with it, make an affidavit (*c*) of their sufficiency (*d*); and the bond, which is to be given to the party requiring the security, and to be deposited with the registrar until the replevin action is finally disposed of (*e*), must be executed in the presence of the judge or registrar, or of a commissioner to administer oaths, or of the clerk to the registrar authorized to take affidavits (*f*). In the *latter* case (that of a deposit), the replevisor, upon making the deposit, must forthwith give notice to the other party, by post or otherwise, of such deposit having been made (*g*).

As soon as the security has been approved of, the registrar issues his warrant (*h*) to the bailiff of the County Court to re-deliver the goods distrained to the replevisor (*i*), and that officer, after re-delivery, makes a return to the Court in obedience to such warrant (*k*). Once the goods are re-delivered they become liable to seizure as upon a distress for subsequently accruing rent, though the condition of the bond to return the goods in the event of the landlord proving successful become thereby impossible of fulfilment (*l*).

Formerly, an action could be brought against the officer of the

(*u*) Sect. 109. The registrar must give a written acknowledgment of such payment: *id.*; Form No. 234 in App. of County Court Rules, 1903. The fee payable in either case is one of 21s. or 10s. 6d., according as the alleged rent exceeds or does not exceed 20l.: Treas. Order, Dec. 30th, 1903, Sched. A, pars. 52, 53.

(*z*) The exemption from stamp duty formerly enjoyed by replevin bonds under the Stamp Act, 1870 (33 & 34 Vict. c. 97, sched. *ad fin.*), now extends only to Ireland (54 & 55 Vict. c. 39, 1st sched. *ad fin.*).

(*y*) See County Court Rules, 1903, App., Form No. 235.

(*f*) The fee payable for notice to the distrainer is 2s. 6d.: Treas. Order Dec. 30th, 1903, Sched. A, par. 54.

(*a*) C. C. R. 1903, App., Forms Nos. 237, 286.

(*b*) *Id.*, O. 29, r. 1.

(*c*) *Id.*, App., Form No. 236.

(*d*) *Id.*, O. 29, r. 2. No officer of the Court may become surety: r. 6.

(*e*) C. C. R. 1903, O. 29, r. 5.

(*f*) *Id.*, r. 3.

(*g*) *Id.*, r. 4.

(*h*) The fee payable for the warrant is 2s. 6d.: Treas. Order, Dec. 30th, 1903, Sched. A, par. 51.

(*i*) The fee payable for delivery is 11. 1s. together with 6d. a mile from the Court house to the place where the goods are: *id.*, Sched. B, par. 44.

(*k*) County Court Rules, 1903, App., Form No. 289. As to the effects, under the old practice, resulting from an irregular warrant, see *Cuckson v. Winter*, 2 M. & Ry. 313.

(*l*) *Wilton v. Wiffen*, 8 L. J. (O. S.) K. B. 303.

Court (*m*) if he failed to use reasonable discretion in the selection of sureties where the security was given by bond (*n*); but now that the party against whom the proceedings are brought has full opportunity given to him of objecting to the sureties proposed (*o*), it is conceived that such officer (*p*) will no longer be liable if they should prove insufficient. Moreover, from the language of the section under which he derives his power to grant replevin bonds (*q*), it would seem that in exercising that power he is acting as a judicial and not as a ministerial officer; and if so, it is well established that he cannot be made liable for any act (even one grounded on actual malice) within his jurisdiction.

As regards the sureties themselves, they are only liable to the extent of the amount of rent in arrear when the distress was levied (as well as of the costs of the action of replevin), but not for subsequent rent (*r*). Consequently, if the whole amount of the bond is claimed from them, and their liability falls short of that sum, their proper course is to apply to the Court for a stay of proceedings on payment of the amount really due and costs, it being referred to a master in case of dispute to ascertain what that amount really is (*s*). And in any case no more can be recovered against them than the penalty in the bond, with the costs of the action upon it (*t*). Hence such action may always be stayed on payment of the penalty and costs, even though the costs incurred by the distrainor in the replevin action greatly exceed the penalty (*u*). Relief may now also be obtained by the obligors of the bond in the County Court; for power to grant it is specifically conferred on the Court (*x*) in which any action on the bond is brought in all cases where it may be just, such relief being given by an order whose effect is a defeasance of the bond (*y*).

On the other hand, the fact that the distrainor has obtained judgment, upon succeeding in the replevin action, for the amount of rent due (*z*) affords no answer to an action on the bond, at all events unless it appear that that judgment has been satisfied (*a*).

(*m*) The sheriff: *supra*, p. 585, note (*h*).

(*n*) *Scott v. Waithman*, 3 Stark. 168; *Hindle v. Blades*, 5 Taunt. 225; *Jeffery v. Bastard*, 4 A. & E. 823; *Plumer v. Brisco*, 11 Q. B. 46.

(*o*) See at note (*b*), *supra*.

(*p*) Now the registrar: *supra*, p. 587.

(*q*) Sect. 134; p. 585, *supra*.

(*r*) *Ward v. Henley*, 1 Y. & J. 285.

(*s*) *Dix v. Groom*, 5 Ex. D. 91, per Lush, J.

(*t*) *Hefford v. Alger*, 1 Taunt. 218.

(*u*) *Brancombe v. Soarborough*, 6 Q. B. 13.

(*x*) See sect. 186 of next-cited Act.

(*y*) 51 & 52 Vict. c. 43, s. 108. For a similar power to order a sum deposited as security (*supra*, p. 586) to be paid out, as may be just, to the depositor, see sect. 109.

(*z*) See *infra*, p. 590.

(*a*) *Turnor v. Turner*, 2 B. & B. 107.

The distrainor, however, if successful in the replevin action, has no remedies beyond those given to him by the bond (or by the judgment itself *(b)*); for once the goods are replevied his lien upon them is gone, so that if the tenant becomes bankrupt while the action is pending the distrainor cannot claim them as against his trustee *(c)*.

B. *The action of replevin.*—(1) In the County Court.—The County Court has *prima facie* jurisdiction in replevin irrespective of the question of title or apparently of the amount in issue; for the provisions in the County Courts Act *(d)*, limiting its jurisdiction to cases where claims do not exceed a specified amount, do not apply to the case of replevin *(e)*. Power, however, is given to the *defendant*, as will be seen presently, to remove the proceedings into the High Court; but the plaintiff should not sue in the High Court, at all events unless he has good ground for believing that the rent exceeded 20*l.*, or that the title to property whose yearly value exceeds 20*l.* would come in question *(f)*.

Actions of replevin in the County Court, which, as has been seen, must be commenced within a month from the time the security is given *(g)*, are brought by plaint entered in the Court of the district where the goods have been seized *(h)*, the plaintiff specifying in his particulars the goods taken and the distress of which he complains *(i)*, as well as any special damage he may have sustained *(k)*. No other cause of action can be joined in the summons *(l)*. The action is tried in the same way as other actions *(m)*; and either party has the right to summon a jury *(n)*. If judgment be given for the defendant, the value of the goods must, where he so requires it, be found by the Court, or, if there be a jury, by the jury *(o)*; and if such value be less than the amount of rent in arrear, judgment shall be given for the amount of such value, but if the amount of rent in arrear be less than the

(b) See under next head.

(c) *Bradyll v. Ball*, 1 Bro. C. C. 427.

(d) Sects. 56 *et seq.*, as extended by 3 Edw. 7, c. 42, s. 3.

(e) *B. v. Raines*, 1 E. & B. 855; *Fordham v. Akers*, 4 B. & S. 578.

(f) *Supra*, p. 586.

(g) *Supra*, p. 586.

(h) 51 & 52 Vict. c. 43, s. 133.

(i) County Court Rules, 1903, O. 34, r. 2.

(k) *Gibbs v. Cruikshank*, L. R. 8 C. P. 454, per Brett, J. The plaintiff may

pay money into Court: see County Court Rules, 1903, O. 9, r. 21.

(l) *Id.*, O. 34, r. 1. This is in accordance with the old practice: *Mungean v. Wheatley*, 6 Exch. 88.

(m) County Court Rules, 1903, O. 34, r. 3, and Forms in Appendix, Nos. 151, 290, as to judgments for plaintiff and defendant respectively.

(n) County Court Rules, 1903, O. 22, r. 3.

(o) *Id.*, O. 34, r. 4.

value so found, judgment shall be given for the amount of such rent, and may be enforced like other judgments of the Court (*p*).

It has been said that in practice the damages recoverable by a plaintiff in replevin are usually confined to the expenses of the replevy, because no other damage has been sustained (*q*). But where this is not the case, he may recover any further damage which has arisen from the seizure of his goods (*r*), though not damage which has arisen from trespass to land committed during such seizure (*s*). Thus damages may be given for loss of business, and for annoyance and injury to credit and reputation in trade, *as well as in respect of the illegal distress itself* (*t*).

Costs in actions of replevin may, by order of the judge, be taxed under columns A, B, or C (*u*), and in default of such order they are to be taxed under column B (*x*). And the judge always has power to award costs on a scale higher than that which would be otherwise applicable, if he certify in writing that the action involved some novel or difficult point of law, or that the question litigated was of importance to some class or body of persons, or of general or public interest (*y*).

The right of appeal which lies to the High Court from the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, is the same as in other actions (*z*); but no appeal will lie where the amount of rent does not exceed 20*l.*, unless the judge shall think it reasonable and proper that an appeal should be allowed and shall grant leave to appeal (*z*). It seems to have been held (following the words of the section) that where the value of the goods seized appeared to exceed 20*l.* a tenant had, irrespective of the amount of rent alleged to be due, a right of appeal (*a*). It is, however, submitted that a comparison of this section with sects. 135 and 136 (*b*) makes it clear

(*p*) County Court Rules, 1903, O. 34, r. 4. As to the poundage payable in replevin, see Treas. Order, Dec. 30th, 1903, Sched. A, par. 32.

(*q*) Per Bovill, C. J., in next-cited case.

(*r*) *Gibbs v. Cruikshank*, L. R. 8 C. P. 454.

(*s*) *Gibbs v. Cruikshank*, *supra*. Hence the former cause of action (but not the latter) is barred by a previous judgment in replevin: *id.*; *Pease v. Chaytor*, 3 B. & S. 620.

(*t*) *Smith v. Enright*, 63 L. J. Q. B. 220. This decision, however, at all events as far as the injury to reputation is concerned, seems inconsistent with dicta of the C. A. in *Dixon v. Calcraft*,

[1892] 1 Q. B. 458, unless, perhaps, in the case where the distress was levied with knowledge that no rent was due, when probably exemplary damages might be awarded.

(*u*) See App. to C. C. R. 1903 (Part IV.).

(*x*) C. C. R. 1903, O. 53, r. 11.

(*y*) 51 & 52 Vict. c. 43, s. 119; C. C. R. 1903, O. 53, rr. 7 (as amended by C. C. R. 1906, r. 13), 9. See also, where title has come in question, O. 53, r. 8.

(*z*) 51 & 52 Vict. c. 43, s. 120. (As to the procedure, see R. S. C. 1883, O. 59, and 57 & 58 Vict. c. 16, s. 1 (5).)

(*a*) *Smith v. Enright*, *supra*.

(*b*) Referred to *supra*, p. 586.

that the value of the goods seized is material in considering the right of appeal—not in cases between landlord and tenant, but—only where the goods replevied have been seized otherwise than under colour of distress (*c*). The parties may deprive themselves of the right to appeal by an agreement made in writing to that effect (*d*). On the hearing of an appeal the High Court may, as in other cases, direct a new trial or order judgment to be entered for either party (*e*).

Removal by certiorari into High Court.—When an action of replevin is brought against him in the County Court, the defendant (*f*) has, as just stated, the right to remove it by writ of certiorari into the High Court. For this purpose he must apply to the High Court, or to a judge thereof, for such writ, and must give security (*g*), to be approved by a master of the Supreme Court for such amount, not exceeding 150*l.*, as such master shall think fit, conditioned to defend such action with effect (*h*), and (unless the replevisor shall discontinue or shall not prosecute such action, or shall become nonsuit therein) to prove before the High Court that he had good ground for believing either that the title to some corporeal or incorporeal hereditament the rent or value whereof exceeded 20*l.* by the year, or to some toll, market, fair, or franchise was in question, or that the rent for which the distress was taken exceeded 20*l.* (*i*).

The application under this section should as a rule be made *ex parte* to a judge in chambers (*k*) (the proceedings being not on the Crown but on the civil side (*l*)), and supported in the usual way by an affidavit (*m*); and the judge may either order the writ to issue at once, or grant a summons against the other party to show cause (*n*). Such summons operates, if the judge so direct in granting it, as a stay of proceedings in the County Court (*n*); but a copy must be served on the plaintiff, and on the registrar, two clear days before the day fixed for the trial, otherwise the judge of

(*c*) The word "damage" contained in this part of the section seems clearly to refer to the case of replevin for distress *damage feasant*.

(*d*) 51 & 52 Vict. c. 43, s. 123.

(*e*) *Id.*, sect. 122.

(*f*) Formerly either party could do so.

(*g*) See 51 & 52 Vict. c. 43, ss. 108, 109, cited *supra*, pp. 586, 587.

(*h*) *I.e.*, successfully (as under ss. 135, 136, *supra*); *Tummons v. Ogle*, 6 E. & B. 571; *Tumnicliffe v. Wilmot*, 2 O. & K. 626; *Stansfeld v. Hellowell*, 7 Exch. 373.

(*i*) 51 & 52 Vict. c. 43, s. 137. The observation just made on sect. 120 (*supra*) as to the value of the goods seized applies (*mutatis mutandis*) to this section also.

(*k*) *Bowen v. Evans*, 3 Exch. 111. The master has jurisdiction: R. S. C. 1883, O. 54, r. 12.

(*l*) See Ann. Cty. Ct. Pr., Part 4, Ch. 5.

(*m*) 2 Chit. Arch. 1267 (14th ed.).

(*n*) 51 & 52 Vict. c. 43, s. 129.

the County Court may (in the absence of any order as to costs by the High Court) order the defendant to pay all or any part of the costs of the day (*o*). And a similar provision obtains where the writ is granted on an *ex parte* application, and the defendant fails before such two days to lodge it with the registrar and to give notice to the plaintiff that it has issued (*p*). If the High Court, or a judge thereof, refuse to grant the writ, no other Court or judge may grant it; but this is not to affect the right of appealing from the decision of the judge of the High Court to the High Court itself (*q*), or prevent a second application from being made for such writ to the High Court, or a judge thereof, on grounds different from those on which the first application was founded (*r*).

Once the writ is issued, the proceedings are transferred to the High Court, and commence there by the defendant entering an appearance; this being followed by the delivery of the plaintiff's statement of claim, and by the other stages of an ordinary action (*s*).

(2) In the High Court.—The action of replevin may, as has been seen (*t*), be brought originally in the High Court (*u*), and if so brought must be commenced within one week from the date of giving the security in the County Court (*u*). The writ of summons should bear the following indorsement:—"The plaintiff's claim is in replevin for goods wrongfully distrained" (*v*). Unlike the procedure in the County Court (*x*), that in the High Court does not forbid the joinder of other causes of action with replevin, though separate trials may be ordered when causes of action cannot be conveniently tried or disposed of together (*y*). If the plaintiff have sustained any special damage (*z*) he should include it in his statement of claim, or he will not be allowed to recover in respect of it (*a*).

All the proceedings (including payment into court where so advised (*b*)) follow in the same way as in other actions (*c*). If the defendant should be successful, he will be entitled to judgment for a return of the goods (*d*) with costs; but in these costs he will not,

(*o*) 51 & 52 Vict. c. 43, s. 129.

(*p*) Sect. 130.

(*q*) See now 57 & 58 Vict. c. 16, s. 1 (4); *Watson v. Pettie*, [1899] 1 Q. B. 54.

(*r*) 51 & 52 Vict. c. 43, s. 132.

(*s*) 2 Chit. Arch. 1268.

(*t*) *Supra*, p. 586.

(*u*) 51 & 52 Vict. c. 43, s. 135.

(*v*) R. S. C. 1883, App. A., Pt. III. s. 4.

(*x*) *Supra*, p. 589.

(*y*) R. S. C. 1883, O. 18, r. 1.

(*z*) See p. 590, *supra*.

(*a*) See *Gibbs v. Cruikshank*, L. R. 8 C. P. 454, per Brett, J.

(*b*) 2 Chit. Arch. 1263.

(*c*) *Id.*, 1258 *et seq.*

(*d*) Enforced by the writ "de retorno habendo." For the old practice as to execution, see 2 Chit. Arch. 1265.

as it seems, be entitled to include the costs of the distress itself (*e*). If the plaintiff succeed in the action, the Court will not grant a new trial, even on payment of costs, without very clear grounds; for the landlord has other remedies for his rent, and a new trial would, where security has been given by bond, renew the liability of the sureties (*f*). But the fact that the amount which has been recovered is small will not prevent the Court from granting a new trial to the defendant, as the real issue in replevin is one to try a right and not to recover damages (*g*).

(*e*) See *Jamieson v. Trevelyan*, 10 Exch. 748. The stat. 11 Geo. 2, c. 19, s. 22, which gave him double costs, is now repealed (see 46 & 47 Vict. c. 49, s. 4, now itself repealed with the usual saving by 61 & 62 Vict. c. 22); but the in-

demnity given in lieu thereof by 5 & 6 Vict. c. 97, s. 2, is not done away with (see *ante*, p. 571).

(*f*) *Parry v. Duncan*, 7 Bing. 243.

(*g*) *Edgson v. Cardwell*, L. R. 8 C. P. 647.

Part II.

DETERMINATION OF THE RELATIONSHIP.

Book III.

MODES OF DETERMINATION.

A TENANCY determines either by having run its prescribed course, or by act of the parties whilst it is so running, or by act of law.

Instances of a determination of the first kind are—where a lease is made for a fixed period and that period expires, or where an event happens in itself uncertain (*e.g.*, the death of the lessee or some other person), upon the happening of which the term is expressly limited (*a*). These cases require no further explanation.

A determination of the second kind is brought about by one of the following acts:—Determination of the will (in tenancies at will), disclaimer and notice to quit (*b*) (in yearly or other “periodic” tenancies), surrender, merger, and forfeiture (in tenancies generally). These will be treated of in their order.

A determination of the third kind, *i.e.*, by act of law only, results from the operation of the Statute of Limitations.

(*a*) See p. 107, *ante*, where other instances will be found.

(*b*) The notice required in order to exercise the power sometimes given to “break” a lease for years at stated

times (see p. 111, *ante*) is subject to the same rules as a notice to quit, and will accordingly be treated of in the chapter on that subject. See *post*, p. 601. As to “periodic” tenancies, see *ante*, p. 3.

CHAPTER I.

DETERMINATION OF WILL
(TENANCIES AT WILL).

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<i>By lessor</i>	596	<i>By lessee</i>	597

A TENANCY at will (*a*) may be determined at any time and by either party during the tenancy (*b*). The right, however, is subject to this limitation, that such determination by one party will not be allowed to operate to the prejudice of the other. Thus, if the tenancy be determined by the lessor, the lessee, being possessed only of an uncertain interest (*c*), will be entitled to emblements (*d*) (while if determined by the lessee it is otherwise (*e*)), and may claim to have a reasonable time allowed him to remove his goods from the premises (*f*), though not to retain exclusive possession for that purpose (*g*). So, on the other hand, if under a tenancy at will rent were made payable periodically, the lessee could not by determining the tenancy deprive the lessor of his right to rent for the current period (*h*), while if the tenancy were determined by the lessor the rent would be lost (*i*): but cases of this kind would now fall within the Apportionment Act (*k*).

By the lessor.—A demand of possession, or anything equivalent thereto, made on the land by the lessor is sufficient (*l*); even a demand expressed to be subject to the payment of rent owing by the tenant will suffice on proof of non-payment by him (*m*). A demand made upon the land on the wife of an undertenant has

(*a*) As to this tenancy, see *ante*, p. 2.

(*b*) Litt. s. 68; Co. Lit. 55 a.

(*c*) *Bulwer v. Bulwer*, 2 B. & A. 470.

(*d*) As to these, see *post*, p. 713.

(*e*) Litt. s. 68.

(*f*) *Id.*, s. 69.

(*g*) *Doe v. M'Kaeg*, 10 B. & C. 721.

(*h*) *Carpenter v. Collins*, Yelv. 73; *Cole, Ejec.* 448.

(*i*) *Leighton v. Theed*, 2 Salk. 413.

(*k*) *Ante*, p. 121.

(*l*) Co. Lit. 55 b; *Cole, Ejec.* 452.

(*m*) *Doe v. Price*, 9 Bing. 356.

also been held good (*n*). But if the demand be made away from the demised premises it is not binding on the lessee unless he has notice of it (*o*). The demand may be made by an agent on behalf of the lessor (*p*). Again, any act done by the lessor inconsistent with his will that the tenancy should continue, and in respect of which, if he were not entitled to possession, he would be liable as for a trespass, will, if done upon the land, suffice to determine the tenancy (*q*). For instance, entry upon the land (*r*) (not being for the purpose of levying a distress (*s*)), cutting down a tree thereon (*t*), or carrying away stone (*u*), are such acts; and so is a feoffment by the lessor with livery of seisin made on the land (*x*). If, however, the act be done off the land—for instance, if the lessor assign his reversion (*y*), or mortgage his interest (*z*), or execute a lease of the premises to another person (*a*),—it must, in order to bind the tenant, have been brought to his knowledge (*b*). So an agreement between the lessor and lessee that the latter shall purchase the reversion also operates as a determination of the will (*c*). And the tenancy is likewise determined by the death of the lessor (*d*).

By the lessee.—A notice by the lessee, followed by his giving up possession, is a valid determination of the tenancy by him (*e*). And so is any act done by him which is inconsistent with his will that the tenancy should continue; assigning or underletting the premises, for instance, is a determination of his estate (*f*), although in order to bind the lessor notice thereof must have been given to him (*g*). If the lessee die (*h*), or commit voluntary waste (*i*), the tenancy is also determined.

(*n*) *Roe v. Street*, 2 A. & E. 329.

(*o*) Co. Lit. 55 b.

(*p*) *Doe v. Price*, *supra*; *Peel v. Whiting*, 8 J. P. 777.

(*q*) *Turner v. Doe*, 9 M. & W. 643; *Locke v. Matthews*, 13 C. B. N. S. 753.

(*r*) Co. Lit. 55 b; *Wallis v. Delmar*, 29 L. J. Ex. 276 (entry by a person claiming under the lessor).

(*s*) *Cole, Ejec.* 453. Such an act, if rent be in arrear, being lawful, and not a trespass.

(*t*) Co. Lit. 55 b.

(*u*) *Turner v. Doe*, *supra*.

(*z*) *Ball v. Cullimore*, 2 C. M. & R. 120.

(*y*) *Doe v. Thomas*, 6 Exch. 854. In this case the lessor became bankrupt, so that the assignment was by operation of law. See p. 450, *ante*.

(*z*) *Jarman v. Hals*, [1899] 1 Q. B. 994.

(*a*) *Dinsdale v. Iles*, 2 Lev. 88; *Hogan v. Hand*, 14 Moo. P. C. 310.

(*b*) *Doe v. Thomas*, *supra*, per Parke, B.; *Doe v. Davies*, 7 Exch. 89 (where the tenant was a party to the assignment).

(*c*) *Daniels v. Davison*, 16 Ves. 249, per Lord Eldon, L. C.

(*d*) *James v. Dean*, 11 Ves. at p. 391, per Lord Eldon, L. C.

(*e*) *Cole, Ejec.* 453.

(*f*) Co. Lit. 57 a.

(*g*) *Pinhorn v. Souster*, 8 Exch. 763.

(*h*) *Doe v. Rock*, Car. & M. 549; 4 M. & Gr. 30; *James v. Dean*, 11 Ves. at p. 391, per Lord Eldon, L. C.; *Scobie v. Collins*, [1895] 1 Q. B. 375.

(*i*) Co. Lit. 57 a. As to waste, see p. 282, *ante*.

CHAPTER II.

DISCLAIMER.

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<i>Nature of a disclaimer by tenant ...</i>	598	<i>Nature of a disclaimer by tenant—contd.</i>	
(a) <i>By setting up title in another</i>	598	(b) <i>By claiming title in himself</i>	599

Nature of a disclaimer by tenant.—A tenant from year to year or other “period” is said to commit a “disclaimer” if he do any act which amounts to a direct repudiation of the relation of landlord and tenant (a). As will be hereafter seen (b), tenancies for a term of years determine on similar grounds by what is called “forfeiture”; but although periodic tenancies are often said to be “forfeited” by disclaimer, it is more correct to say that the operation of a disclaimer is merely to furnish evidence in answer to a plea on the part of the tenant founded on the absence of notice to quit (c), inasmuch as it would be idle to prove such a notice where he has asserted that there is no longer any tenancy (d). A disclaimer, in order to take effect, unlike a forfeiture on a similar ground in a tenancy for years (e), need not be in writing (f), and if in writing need not be stamped (g); but it must amount to a renunciation by the tenant of his character of tenant, either (a) by setting up a title in another, or (b) by claiming title in himself (h). A mere renunciation of tenancy without more, though it may operate as a surrender (i), cannot amount to a disclaimer (k).

(a) *By setting up title in another.*—An attornment to a third person is clearly a disclaimer (l). But what conduct short of this on the part of a tenant who has notice of a claim adverse to his

(a) *Doe v. Stanion*, 1 M. & W. at p. 703, per Parke, B.

(b) *Post*, p. 649.

(c) As to this, see next chapter.

(d) *Doe v. Wells*, 10 A. & E. 427, per Patteson, J.; *Doe v. Whittick*, Gow, 195.

(e) *Doe v. Wells*, *supra*. See *post*, p. 649.

(f) *Doe v. Long*, 9 C. & P. 773.

(g) See *post*, p. 634.

(h) *Doe v. Cooper*, 1 M. & Gr. 135, per Tindal, C. J.

(i) See p. 637, *post*.

(k) *Doe v. Stagg*, 5 Bing. N. C. 564.

(l) *Throgmorton v. Whelpdale*, Bell. N. P. 96; *Doe v. Litherland*, 4 A. & E. 784; *Doe v. Evans*, 9 M. & W. 48. As to attornment, see p. 462, *ante*.

landlord's title amounts to a disclaimer has been considered in many cases, between which the dividing line is not easy to draw. The question is one of law for the Court (*m*), the fair meaning of the words, if merely spoken, being left in case of dispute to the jury (*n*). Thus a mere refusal to pay rent (*o*), or a refusal by the tenant to pay "until I know who is the right owner" (*p*), or until a pending dispute as to a will has settled the ownership (*q*), have been held not to amount to disclaimers (*r*); whilst a refusal by him "because A. B. has ordered me not to pay" (*s*), or for the reason that his "connection as a tenant" with the landlord "has ceased for several years, and that he now pays his rent to his brother" (*t*), and a claim, adversely to the landlord, to hold the demised premises "as long as A. lives" (*u*), have been held to have that effect.

(b) *By claiming title in himself.*—A claim to hold the premises at a "customary rent," coupled with a denial of the landlord's right to raise it (*x*), and a claim to the possession of the title deeds of the demised property (*y*), are instances of a disclaimer of the second class; whilst a claim to be entitled to continue holding at a reduced rent is not a disclaimer (*z*), nor is a demand for proofs of the title of the person claiming to be landlord (*a*). A claim, too, by a yearly tenant to hold the property "because I have bought it" (coupled with the assertion that he was ready to pay for it) was held not to be a disclaimer (*b*), as not being a claim to hold on a ground necessarily inconsistent with the continuance of the yearly tenancy.

The landlord's right, upon an act of disclaimer being committed, is to elect to determine the tenancy immediately; hence any subsequent conduct on his part recognising the continuance of the relationship of landlord and tenant (*e.g.*, a distress for rent) will operate as a waiver, so as to prevent him from taking advantage of it (*c*).

(*m*) *Doe v. Evans, supra*, and other cases cited under this head.

(*n*) *Doe v. Long*, 9 C. & P. 773.

(*o*) *Doe v. Stanion*, 1 M. & W. at p. 703, per Parke, B.

(*p*) *Jones v. Mills*, 10 C. B. N. S. 788.

(*q*) *Doe v. Pasquati*, Peake, 259.

(*r*) The real ground of the decision both in *Doe v. Rollings*, 4 C. B. 188 (see per Wilde, C. J., at p. 201) and in *Doe v. Frowd*, 4 Bing. 557, seems to have been that the relation of landlord and tenant never existed between the parties at all.

(*s*) *Doe v. Pittman*, 2 N. & M. 673.

(*t*) *Doe v. Grubb*, 10 B. & C. 816.

(*u*) *Doe v. Bucknell*, 8 C. & P. 566.

(*z*) *Vivian v. Moat*, 16 Ch. D. 730.

(*y*) *Doe v. Price*, 9 Bing. 356, per Tindal, C. J.

(*z*) *Hunt v. Allgood*, 10 C. B. N. S. 253.

(*a*) *Doe v. Cawdor*, 1 C. M. & R. 398.

(*b*) *Doe v. Stanton*, 1 M. & W. 695.

(*c*) *Doe v. Williams*, 7 C. & P. 322. Cf. pp. 651-2, *post*.

CHAPTER III.

NOTICE TO QUIT.

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<i>When necessary to be given and of</i>		(a) <i>From the lessor</i>	613
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Nature and application.—Notice to quit is a means of determining existing tenancies by one party without the consent of the other (*a*). It is entirely distinct from the “demand for possession” (*b*) which in tenancies at will (but not in tenancies at sufferance (*c*)) must be given, unless the will has been determined (*d*), by the owner of premises, before bringing an action of ejectment (*e*) against the occupier (*f*). It has, indeed, no application to tenancies at will (*g*), nor *à fortiori* to those at sufferance (*h*); nor does it apply to tenancies which are for a term certain,—whether absolutely certain, as for a term of definite duration (*i*), or one to expire on a particular day (*k*)—or to tenancies for a term which, though at first uncertain, afterwards becomes certain (*l*), as one that is to determine on the happening of a particular event (*m*). It follows that,

(*a*) As to the compensation now payable to agricultural tenants when notice to quit “without good and sufficient cause” is given to them by their landlords, see *post*, p. 687.

(*b*) See *Doe v. Inglis*, 3 Taunt. 54; Cole, Ejec. 58—60.

(*c*) See *Doe v. Maissey*, 8 B. & C. 767. Nor is entry necessary in such case: Cole, Ejec. 457.

(*d*) *Ante*, pp. 596, 597; Cole, Ejec. 58.

(*e*) *Post*, pp. 765 *et seq.*

(*f*) *Doe v. Jackson*, 1 B. & C. 448;

Goodtitle v. Herbert, 4 T. R. 680; *Denn v. Rawlins*, 10 East, 261.

(*g*) Cole, Ejec. 37; *Doe v. M'Caeg*, 10 B. & C. 721.

(*h*) Cole, Ejec. 457. See *ante*, p. 1.

(*i*) *Cobb v. Stokes*, 8 East, 358; *Messenger v. Armstrong*, 1 T. R. 53.

(*k*) *Doe v. Sayer*, 3 Camp. 8.

(*l*) See p. 107, *ante*.

(*m*) *Right v. Darby*, 1 T. R. 159, per Lord Mansfield, C. J.; *Doe v. Smith*, 6 East, 530; *Doe v. Miles*, 1 Stark. 181; *Doe v. Bluck*, 8 C. & P. 464.

with the single exception of a class of tenancy to be mentioned (*n*), notice to quit is necessary only in the case of what have been called "periodic" tenancies (*o*): and to these the remarks in the following pages are accordingly confined.

The tenancies referred to as exceptional have already been spoken of (*p*). Where a lease may be determined at stated intervals by power to "break" being given, a reasonable notice of the intention to "break" must (if the lease be silent as to the length of such notice) always be given (*q*). And the option to "break" will be with the lessee alone (*r*), unless it be expressly reserved to the lessor also (*s*), or to either party (*t*); for where the words of the lease are doubtful they are, as a rule, to be construed in favour of the lessee (*u*). But a power to break, "if the parties so think fit," cannot be exercised without the consent of both (*x*). Nor can a power to break conferred on a lessee, "his executors, administrators, or assigns," be exercised by any assign other than the one in whom the term is for the time being vested (*y*). Consequently, where an assignee re-assigned (with a covenant of indemnity) to a person who, after creating an equitable charge by deposit of the lease with the indorsed assignments, disappeared and could not be found, it was held that he was not entitled, though he had purchased the charge, to exercise the power in question; and that the fact that he had taken possession of the property and had paid rent (for which, however, receipts had been given him in the name of the lessee) to the lessor and executed repairs was immaterial (*z*). The notice must be given strictly in accordance with the terms of the power (*a*), *e.g.*, it must be in writing if so required by those terms (*b*); but it is not necessary that it should refer expressly to the power (*c*).

When unnecessary.—Notice to quit is unnecessary in all cases where by the terms of the tenancy the parties agree to dispense

(*n*) See next paragraph.

(*o*) *Ante*, p. 3.

(*p*) See *ante*, p. 111.

(*q*) *Goodright v. Richardson*, 3 T. R. 462.

(*r*) *Dann v. Spurrier*, 3 B. & P. 399; *Doe v. Dixon*, 9 East, 15; *Powell v. Smith*, L. R. 14 Eq. 85.

(*s*) *Goodright v. Mark*, 4 M. & S. 30.

(*t*) *Lucas v. Rideout*, L. R. 3 H. L. 153; *Roe v. Hayley*, 12 East, 464 (where a reasonable intendment of the words used was held to confer the option on

a devisee of the lessor, though in terms applying only to his personal representatives).

(*u*) *Dann v. Spurrier*, *supra*, per Lord Alvanley, C. J.

(*x*) *Fowell v. Tranter*, 3 H. & C. 458.

(*y*) Per Channell, J., in next-cited case.

(*z*) *Seaward v. Drew*, 67 L. J. Q. B. 322.

(*a*) *Right v. Cuthell*, 5 East, 491.

(*b*) *Legg v. Benion*, Willes, 43.

(*c*) *Giddens v. Dodd*, 3 Drew. 485.

with it (*d*). But after the tenancy has once commenced the conduct of one party will not relieve the other from his obligation to give the required notice (*e*), unless such conduct amounts to a surrender (*f*), or to eviction of the tenant (*g*), or to a disclaimer (*h*) by him.

A mortgagor who is allowed to remain in possession is not even a tenant at will, but at most a tenant at sufferance (*i*), and is, therefore, not entitled to any notice to quit or even to a demand of possession (*k*); though if while in occupation he pays rent *quâ* rent, a new tenancy may be created between the parties (*l*). And where a mortgagor, as frequently happens, attorns to the mortgagee at a rent payable yearly or with reference to some aliquot part of a year and recoverable by distress, so that the relationship of landlord and tenant is created between them (*m*), notice to quit to the mortgagor will not be necessary if he make default and the ordinary right of entry upon such default have been reserved to the mortgagee (*n*); and this even though the attornment by the mortgagor is expressed to be as yearly tenant (*o*). The same result was held to ensue where a mortgage deed, which contained a provision that the mortgagor during his occupation should pay half-yearly a certain rent (slightly in excess of the agreed interest), recoverable by distress, stipulated that the mortgagee's right of entry at any time on default should not be affected (*p*); and also where such a deed, though silent as to the mortgagor's right to continue in occupation so long as he paid interest, contained a covenant to pay the interest, recoverable like rent by distress (*q*): though in both cases a distress had been made for previous rent. For the sole object in creating a tenancy in these cases is, not to benefit the mortgagor, but to give the mortgagee a right to distrain for his interest (*r*).

Nor was it formerly necessary for the mortgagee to give notice

(*d*) *Bethell v. Blencowe*, 3 M. & Gr. 119; *In re Threlfall*, 16 Ch. Div. 274, per Cotton, L. J.

(*e*) *Surplice v. Farnsworth*, 7 M. & Gr. 576; *Bickell v. Tullick*, 6 C. & P. 66. As to a mutual agreement to shorten the notice, see *infra*, p. 627.

(*f*) *Sparrow v. Hawkes*, 2 Esp. 505. See *post*, p. 638.

(*g*) As to this, see p. 166, *ante*.

(*h*) As to this, see p. 598, *ante*.

(*i*) *Doe v. Maisey*, 8 B. & C. 767; *Gibbs v. Cruikshank*, L. R. 8 C. P. 454, per Bovill, C. J.

(*k*) *Cole*, Ejec. 38; *Doe v. Giles*, 5 Bing. 421; *Doe v. Boulton*, 6 M. & S. 148.

(*l*) *West v. Fricke*, 3 Exch. 216, per Parke, B.

(*m*) See *ante*, p. 463.

(*n*) *Doe v. Tom*, 4 Q. B. 615.

(*o*) *Metropolitan Counties, &c., Society v. Brown*, 4 H. & N. 428.

(*p*) *Doe v. Olley*, 12 A. & E. 481.

(*q*) *Doe v. Goodier*, 10 Q. B. 957.

(*r*) *Metropolitan Counties, &c., Society v. Brown*, *supra*, per Pollock, C. B.

to quit to a mortgagor's tenant after mortgage (*s*), who being a mere trespasser was held liable and entitled to quit without (*t*); though tenants of a mortgagor *before* mortgage were always entitled to the usual notice (*u*). But notice is now, in certain cases, made necessary by statute (*x*).

The doctrine of notice to quit, it should be observed, applies only where the relationship existing between the parties is that of landlord and tenant (*y*). Hence, for instance, notice to quit need not be given by a party claiming by title paramount to that of the tenant's landlord, the tenant as against him being a mere trespasser (*z*). So again in those cases where one person in the service or employment of another occupies premises belonging to the latter for the purpose of such employment, that relationship not arising (*a*), no notice to quit is necessary. The right to occupy is determined with the employment (*b*), nor will it make any difference in this respect if the parties have expressly agreed that notice of specified length should be given (*c*); though in such case of course either party will have a remedy on the contract if it be broken by the other determining it without the specified notice, unless the absence of notice can be justified by the law of master and servant (*d*).

When the holding, as in the case of lodgings (*e*), is not by lease but by licence, a doctrine analogous to that of notice to quit will apply, inasmuch as a licence cannot, as already seen, be revoked or determined without reasonable notice (*f*).

In the case where a tenancy which determines by the death or cesser of the estate of a landlord entitled for his life or other uncertain interest is (in lieu of the tenant having "emblements" (*g*)) to continue till the expiration of the current year of the holding, it is specially provided by statute that no notice to quit shall be necessary on either side (*h*).

(*s*) As to recognition, however, by the former of the latter, see p. 59, *ante*.

(*t*) *Keech v. Hall*, 1 Sm. L. C. 511 (11th ed.); *Thunder v. Belcher*, 3 East, 449.

(*u*) *Cole*, Ejec. 474, 475; *Burrowes v. Gradin*, 1 D. & L. at p. 218, per Wightman, J.

(*x*) See 44 & 45 Vict. c. 41, s. 18, and 53 & 54 Vict. c. 57, s. 2 (where, however, it would seem that the duty to give notice is unilateral); *ante*, p. 61.

(*y*) *Doe v. Quigley*, 2 Camp. 505.

(*z*) *Keech v. Hall*, *supra*; *Doe v. Hilder*, 2 B. & A. 782.

(*a*) *Ante*, p. 6.

(*b*) *R. v. Chesant*, 1 B. & A. 478, per Lord Ellenborough, C. J.

(*c*) *Doe v. Derry*, 9 C. & P. 494; *Mayhew v. Suttle*, 4 E. & B. 347.

(*d*) See last-cited case at p. 356 of the report.

(*e*) *Ante*, p. 8.

(*f*) *Ante*, p. 9.

(*g*) See *post*, p. 713.

(*h*) 14 & 15 Vict. c. 25, s. 1; *post*, p. 715.

When necessary and of what length.—Subject to the exceptions above stated, the general rule is that before the tenancies under discussion can be determined some notice to quit must be given. The rule extends to tenancies implied from holding over (*i*), or, in the absence of claim to specific performance, from entry and payment of rent (*k*) (with a qualification, however, which will be stated presently (*l*)), as well as to those created by express agreement. And in case of the death of either landlord (*m*) or tenant (*n*), or the assignment of either the reversion (*o*) or the term (*p*), the requisite notice must still be given to the persons entitled for the time being in virtue of such death or assignment.

The obligation to give (and the correlative right to receive) notice to quit, and the length of the notice in each case, are determined by either (1) the terms of the tenancy, or (2) local custom, or (3) the common law, or (4) statutory enactment.

A notice to quit of less than the requisite length will be invalid; nor will even the acquiescence of the party to whom it is given (unless the circumstances amount to a surrender (*q*)) render it good (*r*).

In computing the length of the notice, the day upon which it is given (except in the case of a "customary" half-year's notice (*s*)) is not to be included (*t*).

(1.) *By the terms of the tenancy.*—The parties to a tenancy are, as a rule, free to contract that it be determined by notice of any length (*u*), or expiring at any time (*v*), or without notice (*x*), or by notice to be given only after the lapse of a fixed period (*y*), or subject to any condition (*e.g.*, to be given by the lessee only upon due performance by him of the covenants of the lease (*z*)), on the part of both or either (*a*). Thus, an agreement that a tenancy from

(*i*) *Ante*, p. 396.

(*k*) *Ante*, p. 343.

(*l*) *Infra*, p. 607.

(*m*) *Maddon v. White*, 2 T. R. 159.

(*n*) *Gulliver v. Burr*, 1 W. Bl. 596;
Doe v. Porter, 3 T. R. 13, per Lord
Kenyon, C. J.

(*o*) *Birch v. Wright*, 1 T. R. 378, per
Buller, J.

(*p*) *Doe v. Samuel*, 5 Esp. 173.

(*q*) As to this, see p. 638, *post*.

(*r*) *Infra*, p. 627.

(*s*) *Infra*, p. 607.

(*t*) *Quartermaine v. Selby*, 5 T. L. R.
223; *Sidebotham v. Holland*, [1895]
1 Q. B. 378.

(*u*) *Doe v. Raffan*, 6 Esp. 4; *Doe v.*

Donovan, 1 Taunt. 555; *Doe v. Baker*,
8 Taunt. 241; *Jones v. Shears*, 4 A. & E.
832; *Crowley v. Vitty*, 7 Exch. 319;
Cannon Brewery v. Nash, 77 L. T. 648.

(*r*) *Doe v. Hulme*, 2 M. & Ry. 433.
See *infra*, p. 609.

(*z*) *Bethell v. Blencowe*, 3 M. & Gr.
119.

(*y*) *Cannon Brewery v. Nash*, *supra*;
Wiz v. Rutson, [1899] 1 Q. B. 474.

(*z*) *Grey v. Friar*, 4 H. L. C. 565;
Porter v. Shephard, 6 T. R. 665. See
Seauward v. Drew, 67 L. J. Q. B. 322.

(*a*) *In re Threlfall*, 16 Ch. Div. 274,
per Cotton, L. J.; *King v. Eversfield*,
[1897] 2 Q. B. 475.

year to year shall after the first quarter be determinable by the lessor without notice is valid, and leaves intact the other incidents of such a tenancy, and among them the obligation on the part of the lessee to give the regular notice before quitting (*b*).

A stipulation, however, restricting the right of the lessor (*c*) to determine the tenancy by giving the regular notice, will be void if it be repugnant to the nature of the estate granted by the demise. Nor can such a stipulation be imported into yearly tenancies implied, in the absence of a right to specific performance (*d*), under an agreement (*e*), or under an inoperative lease (*f*). This doctrine would apply to any stipulation for a notice by the lessor longer than the "period" of the tenancy, as for two years' notice in a tenancy from year to year (*g*). On the same ground an agreement not to disturb the tenant so long as he pays his rent (*h*), or until the lessor requires the premises for his own purposes (*i*), has been held void as repugnant to a yearly or weekly tenancy; for if effect were given to such an agreement the term granted by the demise would be necessarily enlarged, and the tenant indeed would take an estate for life (*k*). But, as already mentioned, it is now settled that in cases of this kind (where there is conveyed a *primâ facie* interest for life) effect would now be given to such agreement by a decree for specific performance (*l*).

The result of the whole, speaking generally, is that notice of any length agreed upon will be valid, provided (if by the lessor) it do not exceed the "period" of the tenancy itself; in a tenancy from year to year, for example, a full year's notice is good, whether imposed by statute (*m*), by agreement (*n*), or by custom (*o*).

An agreement for "six months' notice," by a well-established legal construction, *primâ facie* intends six *lunar* months (*p*). But the parties may agree for six *calendar* months, in which case the full period so stipulated must run; so that a notice, for example,

(*b*) *In re Threlfall*, *supra*, per Cotton, L. J.

(*c*) *Secus* (it is submitted), for the reasons here given, if such restriction be put on the *lessee*: though there is an *obiter dictum* by Lord Ellenborough, C. J., in *Doe v. Broune*, *infra*, which seems to imply the contrary.

(*d*) *Ante*, pp. 10–13.

(*e*) *Tooker v. Smith*, 1 H. & N. 732.

(*f*) *Wood v. Beard*, 2 Ex. D. 30.

(*g*) *Tooker v. Smith*, *supra*.

(*h*) *Doe v. Broune*, 8 East, 165.

(*i*) *Cheshire Lines Committee v. Lewis*, 50 L. J. Q. B. 121.

(*k*) *Ante*, p. 112, where the cases are given.

(*l*) See pp. 16, 113, *ante*, citing *Zimble v. Abrahams*, [1903] 1 K. B. 577.

(*m*) 46 & 47 Vict. c. 61, s. 33; *infra*, p. 608.

(*n*) *In re Threlfall*, 16 Ch. Div. 274, per Cotton, L. J.

(*o*) *Ros v. Charnock*, Peake, 6. See under next head.

(*p*) *Rogers v. Hull Dock Co.*, 34 L. J. Ch. 165; *Johnstone v. Hudleston*, 4 B. & C. at p. 932, per Bayley, J.; *Bruner v. Moore*, [1904] 1 Ch. 805.

under such an agreement given on the 26th of September for the following 25th of March (*q*) will be invalid (*r*).

Where an agreement provided that the tenancy might be determined by "one week's notice" on either side, and it was further stipulated that the key of the premises was to be delivered to the landlord before noon on the day of quitting, it was held that as no regard could in law be paid to the fraction of a day, the requisite notice was one which left seven clear days, and that notice given on the rent day in one week (even though before noon) to expire on the corresponding day of the following week was insufficient (*s*).

(2.) *By local custom.*—The length of notice, in the absence of express stipulation between the parties (*t*), may be regulated by local custom if such can be shown to exist (*u*); a custom of the country requiring, for instance, a whole year's notice to determine a yearly tenancy would be valid (*x*). But such custom, like other customs, must be reasonable, and so generally known as to be tacitly incorporated in the contract of tenancy (*y*). It is a general rule that all customary obligations not expressly or impliedly excluded by the contract of tenancy remain in force (*z*).

(3.) *By common law.*—The general doctrine is that, in the absence of express and valid stipulation or binding local custom, *reasonable* notice must be given in order to determine the tenancy by either the landlord on the one hand or the tenant on the other (*a*). The precise length of such notice has, from early times, been fixed in the case of a tenancy from year to year (*b*); but in other cases, while a notice equal in length to the "period" of the tenancy is undoubtedly sufficient (*c*) (if it expire with one of such periods (*d*)), it appears to be still a question of fact in each case—except perhaps in the case of a quarterly tenancy, where a full quarter's notice seems necessary (*e*)—whether any shorter notice

(*q*) Which otherwise would be good: *infra*, p. 607.

(*r*) *Quartermaine v. Selby*, 5 T. L. R. 223.

(*s*) *Weston v. Fidler*, 88 L. T. 769.

(*t*) *Travers v. Mason*, 45 W. R. 77.

(*u*) *Tyley v. Seed*, Skin. 649.

(*x*) *Roe v. Charnock*, Peake, 6, per Lord Kenyon, C. J. As to the effect of local custom upon the time of expiration of a notice, see p. 609, *infra*.

(*y*) See per Lord Blackburn, *Tucker v. Linger*, 8 App. Ca. 508; notes to

Wiglesworth v. Dallison, 1 Sm. L. C. 545.

(*z*) *Hutton v. Warren*, 1 M. & W. 466, per Parke, B. See *ante*, p. 152, and *post*, pp. 719, 720.

(*a*) See notes to *Clayton v. Blakey*, 2 Sm. L. C. at p. 130.

(*b*) See *Parker v. Constable*, 3 Wils. 25, where, as in other early cases, the tenancy is spoken of as one at will.

(*c*) *Doe v. Hazell*, 1 Esp. 94; *Beaumont v. Cox*, 16 L. R. (1.) 270, 458.

(*d*) *Infra*, p. 609.

(*e*) See *Towne v. Campbell*, 3 C. B. 921.

may not be valid as being reasonable. In monthly and weekly tenancies (*f*) all that can be said at present is that a month's or a week's notice respectively on either side is sufficient, and a reasonable notice indispensable (*g*).

When the tenancy is from year to year, either landlord or tenant may determine it by giving a half-year's notice to quit (*h*), expiring with the end of the year (*i*). The mode in which the rent is made payable—whether quarterly, half-yearly, &c.—is, in regard to this point, immaterial (*k*). A distinction is here to be observed, however, between tenancies which commence on one of the four ordinary feast or quarter days, and those which do not. In the former the half-year's notice which is required is that of a "customary" half-year (*l*); a notice given on or before one of such quarter days to quit at the next quarter day but one is sufficient (*m*), whether the intervening period exceed or fall short of the number of days (182) which, by legal computation, constitute half a year (*n*). A notice, for example, given on the 29th of September to quit on the following 25th of March is good, though the number of intervening days is only 176 (*o*): and a notice given on the 26th of March to quit on the following 29th of September is bad, though the number of intervening days is 186 (*p*). But in the case of the latter tenancies a full half-year's notice (amounting to 182 days at the least (*q*)) is necessary and sufficient (*r*).

The requirement of a half-year's notice to put an end to a tenancy from year to year extends, as already mentioned, to the yearly tenancy implied by law from holding over (*s*) or, in the absence of claim to specific performance, from entry and payment of rent (*t*); with this exception, however (as regards tenancies of the latter class), that where such entry and payment are made

(*f*) As to lodgings, see the observation *supra*, p. 603.

(*g*) *Jones v. Mills*, 10 C. B. N. S. 788 (commenting on *Huffell v. Armitstead*, 7 O. & P. 56); *Bowen v. Anderson*, [1894] 1 Q. B. 164. In Ireland the necessity of a week's notice to determine a weekly tenancy has, though not without a difference of judicial opinion, been established: *Harvey v. Copeland*, 30 L. R. (I.) 412.

(*h*) *Right v. Darby*, 1 T. R. 159; notes to *Clayton v. Blakey*, *supra*.

(*i*) *Infra*, p. 609.

(*k*) *Shirley v. Newman*, 1 Esp. 266.

(*l*) *Roe v. Doe*, 6 Bing. 574, per Tindal, C. J.

(*m*) *Howard v. Wemsley*, 6 Esp. 53; *Papillon v. Brunton*, 5 H. & N. 518; *Sandill v. Franklin*, L. R. 10 C. P. 377.

(*n*) Co. Lit. 135 b.

(*o*) *Doe v. Green*, 4 Esp. 198, and cases last cited.

(*p*) *Morgan v. Davies*, 3 C. P. D. 260.

(*q*) Co. Lit. *ubi sup.*; notes to *Duppa v. Mayo*, 1 Wms. Saund. at p. 386 (ed. 1871). And excluding the day on which the notice is given: *supra*, p. 604.

(*r*) See notes to *Clayton v. Blakey*, 2 Sm. L. C. at p. 131. See, too, *Sidebotham v. Holland*, [1895] 1 Q. B. 378.

(*s*) *Ante*, p. 396.

(*t*) *Ante*, p. 344; *Doe v. Bell*, 2 Sm. L. C. 119.

under an inoperative lease or agreement of defined length, the implied yearly tenancy will expire without notice at the end of the term intended to be created (*u*), for this is one of the provisions of such lease or agreement which are applicable to a yearly tenancy (*x*). And this applies even though the agreement provide for the extension, on certain conditions, of the term therein specified (*y*).

The question whether, in a yearly tenancy made to endure for a certain number of years and a fractional part of a year (*e.g.*, three years and three quarters), the tenant can quit without notice at the end of the last integral year (the third), has been raised but not decided (*z*).

The rule in yearly tenancies requiring a half-year's notice does not extend to incorporeal hereditaments; rights of shooting for instance, conferred by an instrument more than a mere licence, can be determined by any notice sufficient under the circumstances to be considered reasonable (*a*).

(4.) *By statute*.—A special provision as regards notice to quit is applicable to yearly tenancies under the Agricultural Holdings Act, 1883 (*b*), which enacts (*c*) that “where a half-year's notice, expiring with a year of tenancy, is *by law* necessary and sufficient for determination of a tenancy from year to year . . . a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same, unless the landlord and tenant of the holding, by writing under their hands (*d*), agree that this section shall not apply, in which case a half-year's notice shall continue to be sufficient; but nothing in this section shall extend to a case where a tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors.” The scope of this enactment has, however, been considerably narrowed by the decision that a yearly tenancy made determinable upon six months' notice *by express agreement* is not within it, inasmuch as the notice made necessary in such a case is necessary, not “by law,” but by contract (*e*). And the same result was held to follow, where by

(*u*) *Doe v. Stratton*, 4 Bing. 446; *Tress v. Savage*, 4 E. & B. 36.

(*x*) *Ante*, pp. 344, 396.

(*y*) *Doe v. Moffatt*, 15 Q. B. 257.

(*z*) *Sauvage v. Dupuis*, 3 Taunt. 410.

(*a*) *Love v. Adams*, [1901] 2 Ch. 598. The holding here was at a yearly rent from Lady Day, and a verbal notice given in the early part of March, after

the end of the shooting season, was held sufficient.

(*b*) 46 & 47 Vict. c. 61. As to the holdings to which the Act applies, see sects. 54, 61; *post*, p. 728.

(*c*) Sect. 33.

(*d*) See *ante*, p. 452, note (*p*).

(*e*) *Wilkinson v. Calvert*, 3 C. P. D. 360, decided under the corresponding section of the Act of 1875 (38 & 39 Vict. c. 92), s. 51.

agreement six months' notice was stipulated for, "to be given in the usual way to determine the tenancy" (*f*).

When to expire.—The rule is that, in the absence of agreement (*g*) or of local custom (*h*) to the contrary, a notice to quit must be given to expire on and with the last day of some "period" of the tenancy (*i*). Where a yearly tenancy commences on one of the usual quarter days, the notice must be expressed to expire on that day (*k*); and where it commences on some other day the same rule may be followed, though the notice will be valid, and indeed more regular, if expressed to expire—when the tenancy ends (*l*)—on the day before the anniversary of its commencement (*m*). And the rule that either of such days may be named holds good, whether the tenancy be expressed to commence "at," "on," or "from" the day in question (*n*). If given to expire on a wrong day it will be invalid (*o*) (though it may become binding by the acquiescence of the party to whom it is given if the circumstances amount to a surrender (*p*)); nor is a party bound by his own notice if it turns out to have been so given, even though it has been accepted as valid by the other party (*q*).

Thus, where the agreement was for a yearly tenancy, or (what amounts to the same thing (*r*)) a tenancy at a yearly rent, the tenant to quit at a quarter's notice, he was held entitled to a quarter's notice expiring with a year of the tenancy, the effect of the agreement being merely to shorten the half-year's notice expiring with some year of the tenancy which is required by law (*s*). Notice, however, to a tenant who agrees "always to be subject to quit at three months' notice" is valid if it expire with any quarter, for he is deemed to be a quarterly tenant (*t*). And where the agreement was for a holding at a yearly rent "until one

(*f*) *Barlow v. Teal*, 15 Q. B. Div. 501.

(*g*) *Doe v. Hulme*, 2 M. & Ry. 433; *Cannon Brewery v. Nash*, 77 L. T. 648.

(*h*) *Brown v. Burtinshaw*, 7 D. & Ry. 603.

(*i*) See also p. 619, *infra*, where cases are given on the form of the notice which illustrate this rule.

(*k*) Per Lindley, L. J., in next-cited case.

(*l*) *Ante*, p. 113.

(*m*) *Sidebotham v. Holland*, [1895] 1 Q. B. 378.

(*n*) *Id.*, per Lindley, L. J.

(*o*) *Doe v. Lea*, 11 East, 812; *Simmons v. Underwood*, 76 L. T. 777.

(*p*) See *Brown v. Burtinshaw*, *supra*. Cf. p. 638, *post*.

(*q*) *Doe v. Milward*, 3 M. & W. 328. Cf. *infra*, p. 627.

(*r*) *Ante*, p. 3.

(*s*) *Doe v. Donovan*, 1 Taunt. 555; *Dixon v. Bradford, & Co., Coal Supply Society*, [1904] 1 K. B. 444. In the latter case the agreement contained, on the part of the tenant, a stipulation to pay rates and taxes, which was held to be an additional indication that something more than a quarterly tenancy was intended. Cf. *Lewis v. Baker*, *infra*.

(*t*) *Kemp v. Derrett*, 3 Camp. 510; *ante*, p. 4.

of the parties should give to the other six calendar months' notice to quit," it was held that it might be given to expire with any half-year from the commencement (*u*) of the tenancy (*x*). On the other hand, where a letting "until such tenancy shall be determined as hereinafter mentioned," at a yearly rent, payable every quarter in equal portions on four stipulated days, provided that it should be lawful for either of the parties to determine the tenancy "hereby created" by giving to the other three calendar months' notice in writing, and contained various stipulations all pointing to a yearly tenancy, it was held that the effect was to create such a holding with the one special term of three months' notice to quit (*y*). The general rule was held further to be displaced where it was an implied term of a yearly tenancy of mines that the tenant might determine it "at any time hereafter" on giving the lessors six months' notice to quit (*z*). So where an agreement, by which rent was to be payable—in advance if required—on certain specified days (not the usual quarter days) and the tenancy to commence on one of them, was made "subject to three months' notice on either side at any time," it was held that the tenancy was determinable by a three months' notice terminating on a day other than one of those specified in the agreement (*a*).

Where a yearly tenancy is implied from the landlord allowing the tenant to hold over after the expiration of a lease and accepting rent (*b*) (whether the same as reserved in the lease or not (*c*)), each year of such new tenancy is for the purpose of this rule deemed (in the absence of evidence to the contrary) to commence, not from the expiration of the lease, but on the anniversary of its commencement (*d*). This rule extends to an assignee or a tenant substituted by arrangement for the original lessee, where the holding over has been by the original lessee in the first instance (*e*). But it does not apply where, the assignment having taken place during the currency of the term, the holding over has been only by the assignee and never by the lessee himself (*f*); unless the holding by the new tenant is a mere continuation of the original

(*u*) See at note (*q*), *infra*.

(*x*) *Doe v. Grafton*, 18 Q. B. 496.

(*y*) *Lewis v. Baker*, [1905] 2 K. B. 576; *affd.*, C. A., [1906] 2 K. B. 599.

(*z*) *Bridges v. Potts*, 17 C. B. N. S. 314.

(*a*) *Soames v. Nicholson*, [1902] 1 K. B. 157.

(*b*) *Ante*, p. 395.

(*c*) *Berrey v. Lindley*, and *Kelly v. Patterson*, *infra*.

(*d*) *Doe v. Dobell*, 1 Q. B. 806; *Berrey v. Lindley*, 3 M. & Gr. 498. The question arises where the term of years granted by the lease is not an integral number.

(*e*) *Doe v. Samuel*, 5 Esp. 173.

(*f*) *Doe v. Lines*, 11 Q. B. 402.

tenancy, *e.g.*, where upon the death of a yearly tenant his widow agreed to continue in occupation on the same terms and afterwards held over (*g*). On the other side, too, the rule applies even where the holding over is under a successor of the lessor, between whom and such lessor there is no privity of estate; as where the lease is by a tenant for life and the holding over under the remainderman (*h*), or where a lessee underlets during his term and on its expiration a new lessee allows the underlessee to hold over (*i*). But where a tenant occupies under a demise made by a mortgagor after mortgage (not being made under the Conveyancing Act, and consequently not binding on the mortgagee (*k*)), and pays rent to the mortgagee under a notice from the latter asserting his title paramount and requiring him to do so,—the yearly tenancy thereby created (*l*) commences with the period for which rent was first paid to the mortgagee (although such tenancy is in other respects so far as may be upon the terms of the previous tenancy); for such assertion of title is tantamount to eviction by the mortgagee (*m*).

The rule that the notice to quit in a yearly tenancy must expire with the end of the year applies, as has been seen, whether the tenancy commences on one of the usual quarter days or not. The notice in a yearly tenancy which commences on the 7th of May, for instance, must expire on that day—or on the day before (*n*)—at the end of the first or some succeeding year of the holding (*o*). (Similarly the notice to determine a quarterly tenancy commencing on the 29th of October should expire on the 29th day of the months of January, April, July, or October (*p*).) But where a tenant who enters in the middle of a quarter by agreement pays a proportionate rent for the broken quarter and afterwards on the regular quarter days, the tenancy is deemed to commence with, and notice to quit must be given to expire on, the first of such quarter days which follows his entry (*q*). And the same result holds where (the broken period being neglected) it is specially stipulated that the first payment of rent shall be made on the quarter day next but one following the day when possession is taken (*r*). This, however,

(*g*) *Humphreys v. Franks*, 18 C. B. 323, where the question on the whole of the facts was left to the jury.

(*h*) *Roe v. Ward*, 1 H. Bl. 97.

(*i*) *Kelly v. Patterson*, L. R. 9 C. P. 681.

(*k*) *Ante*, p. 58.

(*l*) *Ante*, p. 60.

(*m*) *Corbett v. Plowden*, 25 Ch. Div. 678.

(*n*) *Supra*, p. 609.

(*o*) *Doe v. Matthews*, 11 C. B. 675.

(*p*) *Kemp v. Derrett*, 3 Camp. 510.

(*q*) *Doe v. Johnson*, 6 Esp. 10; *Doe v. Stapleton*, 3 C. & P. 275; *Simmons v. Underwood*, 76 L. T. 777.

(*r*) *Sandill v. Franklin*, L. R. 10 C. P. 377.

does not apply when the demise in terms specifies that the tenancy commences on the day of the letting (*s*).

It sometimes happens that the demise provides that different portions of the premises let together, as for instance a house and lands, are to be entered upon at different times, without indicating any time from which the whole is to be considered as let (*t*). In such cases the most prudent course is to specify the different dates in the notice to quit (giving it in time for the earliest of them), and to make it to expire in its different parts in accordance with them respectively. But failing this the notice will be valid as to the whole if given in time for, and made to expire with, the letting of that portion of the premises which, having regard to its value and importance, is the principal subject-matter of the demise (*u*). What is such principal subject-matter is a question of fact and for a jury to decide, while it is for the Court to rule upon their finding whether the notice was given in time or not (*x*).

A notice to quit is not in itself even *prima facie* evidence of its having been given for the right date (*y*); and if it be served on the tenant personally, his failure at the time—and the same thing applies where such failure is upon his being personally served after the expiration of the notice with proceedings in ejectment (*z*)—to object that it is made to expire at a wrong date, though it may raise a presumption that the notice was rightly given (*a*), is of itself merely very slight evidence to support that inference (*b*). Nor will it preclude him from raising the objection afterwards (*c*). If the notice was invalid, what should prevent his lighting his pipe with it? (*d*). But a tenant who, in answer to a formal application by the landlord, represents, whether from mistake or by design, that his holding commenced at a certain date may be estopped from afterwards disputing such date if he receive a notice to quit made to expire thereon accordingly (*e*). If the time of commencement of the tenancy be altogether uncertain and

(*s*) *Sidebotham v. Holland*, [1895] 1 Q. B. 378.

(*t*) *Holme v. Brunskill*, 3 Q. B. Div. 495, affords an instance of this.

(*u*) *Doe v. Snowden*, 2 W. Bl. 1224; *Doe v. Spence*, 6 East, 120; *Doe v. Watkins*, 7 East, 551.

(*x*) *Doe v. Howard*, 11 East, 498; *Doe v. Hughes*, 7 M. & W. 139.

(*y*) *Doe v. Calvert*, 2 Camp. 387.

(*z*) *Doe v. Wombwell*, 2 Camp. 559. As to ejectment, see *post*, pp. 765 *et seq.*

(*a*) *Doe v. Forster*, 13 East, 405; *Thomas v. Thomas*, 2 Camp. 647; *Doe v. Biggs*, 2 Taunt. 109.

(*b*) *Walker v. Godé*, 6 H. & N. 594, per Wilde, B.

(*c*) *Oakapple v. Copous*, 4 T. R. 361.

(*d*) Per Blackburn, J., *Prince v. Evans*, 29 L. T. 835.

(*e*) *Doe v. Lambly*, 2 Esp. 635. Compare *General Assurance Co. v. Worsley*, 64 L. J. Q. B. 253 (cited *infra*, p. 619), where the inquiry was by the tenant.

depend on questions of fact, the decision of the matter should be left, as a question of fact, entirely to the jury (*f*).

By and to whom.—(*a*) *From the lessor.*—Notice on the part of the lessor must be given by him, or, on devolution of his estate, by the person for the time being legally entitled to the immediate reversion, whether as assignee, devisee, heir, executor, or administrator of the landlord (*g*). A lessor, for instance, cannot give notice to a yearly tenant after making a lease for years to a third party, because the effect of such lease, as has already been pointed out (*h*), is to pass the reversion of the yearly tenancy (*i*). But the mere fact that some of the receipts for rent have been given in the joint names of the lessor and other persons (*e.g.*, his partners in trade) does not make a notice by the lessor alone invalid (*k*). Any proviso in the lease, however, relating to this matter must be strictly followed; but where power to give notice was reserved to a lessor who afterwards assigned to himself and another as tenants in common, it was held that notice in the names of both was valid (*l*).

If the demise is by two or more *joint tenants*, notice by one on behalf of all will determine the tenancy as to all (*m*), unless the terms of the demise expressly or impliedly require notice by all (*n*). (And inasmuch as this doctrine is founded on the principle that the true character of such a tenancy is, not that the lessee holds of each joint tenant the share of each so long as he and each shall please, but that he holds the whole of all so long as he and all shall please (*o*), it would seem that the same result would follow where the notice given by one of the joint tenants is not expressed to be on behalf of any one but himself (*p*).) One of several executors or administrators, who are in the position of joint tenants (*q*), may consequently give a valid notice in the names of all (*r*). It has also been held that each of a number of joint tenants may by giving a notice to quit recover his own share (*s*), since he has the right (*t*)

(*f*) *Walker v. Godè*, *supra*.

(*g*) *Cole*, Ejec. 42.

(*h*) *Ante*, p. 20.

(*i*) *Wordsley Brewery Co. v. Halford*, 90 L. T. 89.

(*k*) *Doe v. Baker*, 8 Taunt. 241.

(*l*) *Liddy v. Kennedy*, L. R. 5 H. L. 134.

(*m*) *Doe v. Summerson*, 1 B. & Ad. 135; *Doe v. Hulme*, 2 M. & Ry. 433 (where the joint lessors were partners

in trade); *Doe v. Hughes*, 7 M. & W. 139; *Alford v. Vickery*, Car. & M. 280.

(*n*) *Right v. Cuthell*, 5 East, 491.

(*o*) Per Lord Tenterden, C. J., in next-cited case.

(*p*) See *Doe v. Summerson*, *supra*.

(*q*) 1 Wms. Exors., pt. 3, bk. 1, ch. 2.

(*r*) *Cole*, Ejec. 43.

(*s*) *Doe v. Chaplin*, 3 Taunt. 120.

(*t*) *Ante*, p. 37.

to demise it. If *tenants in common* demise jointly, notice by one on behalf of all, whether given with their authority or not, is, it would seem, sufficient to determine the tenancy as to all (*u*); but in other cases notice by one tenant in common is valid as to his undivided share (*x*), and as to that only (*y*), unless he be authorized to act on behalf of the others (*z*).

The authorized agent of every person entitled to give notice may give it effectually on his behalf. If he act under a special authority he must give it as agent on behalf of his principal; but if under the authority incidental to a general agency to manage the demised property (*e.g.*, where a *cestui que trust* is allowed by his trustees to have entire control of settled estates), he may give it in his own name (*a*). In accordance with the usual rule (*b*), the notice must be such as the tenant may act upon with safety, that is, one which is in fact, and which the tenant has reason to believe to be, binding on the landlord (*c*). An agent to receive rents and to let (*d*), a receiver with a general power of letting appointed by the Chancery Division (*e*), and a steward of a corporation, such as a dean and chapter (*f*), have been held to have such general authority; a mere receiver of rents, as such, has not (*g*). The question whether the agent has authority or not is in ordinary cases one of fact to be decided by a jury (*g*). If an unauthorized agent—the agent of an agent, for instance (*h*)—give notice ostensibly on behalf of the lessor, it has been held that the latter may ratify it subsequently (*i*); but the notice ought to be such that the tenant may rely on it at the moment of receiving it (*k*), and if this is not the case the better opinion seems that no subsequent ratification by any one will make it valid (*l*), especially where the requisite interval has commenced to run (*m*).

(*u*) *Cole*, Ejec. 44.

(*x*) *Cutling v. Derby*, 2 W. BL 1075;
Doe v. Gardiner, 12 C. B. 319.

(*y*) *Cole*, Ejec. 44.

(*z*) See next paragraph.

(*a*) *Jones v. Phipps*, L. R. 3 Q. B. 567. In *Broune v. Peto*, 16 T. L. R. 131 (affd., C. A., on another point: see *ante*, p. 62), a notice by an agent purporting to act on behalf of a *cestui que trust* seems to have been held good as given on behalf of the legal owners, on the ground that the tenant "had received the notice as given on behalf of the landlords, whoever they might be." There seems here to have been no reference to any control of the property by the *cestui que trust*.

(*b*) See *infra*, p. 618.

(*c*) *Jones v. Phipps*, *supra*, per Lush, J.; *Broune v. Peto*, *supra*.

(*d*) *Doe v. Mizem*, 2 Moo. & R. 56.

(*e*) *Doe v. Read*, 12 East, 57.

(*f*) *Roe v. Pierce*, 2 Camp. 96. Nor need the agent be appointed under seal: *id.*; *Doe v. Bold*, 11 Q. B. 127.

(*g*) *Doe v. Walters*, 10 B. & C. 626.

(*h*) *Doe v. Robinson*, 3 Bing. N. C. 677.

(*i*) *Goodill v. Woodward*, 3 B. & A. 689.

(*k*) *Doe v. Walters*, *supra*.

(*l*) *Doe v. Goldwin*, 2 Q. B. 143.

(*m*) *Doe v. Walters*, *supra*. In *London and Blackwall Ry. Co. v. Cross*, 31 Ch. Div. at pp. 363, 364, doubts are suggested by the C. A. as to whether an unauthorized notice to quit can ever be ratified.

A notice, as it has been held, cannot be ratified by a person unless it purport to have been given on his behalf (*n*), though, of course, it does not follow that such person need be actually named in the notice, so long as he was capable of being ascertained at the time it was given (*o*). Thus a notice given to a tenant "on behalf of your landlord" might (it is submitted) be ratified by the person in effect entitled to the reversion.

The notice should be given to (*p*) the lessor's immediate tenant (*q*), or his executor or assignee, and not to a mere undertenant (*r*); but a person actually in occupation of the demised premises is for this purpose presumed to be an assignee until it is proved that he is only an undertenant (*s*). So if after a tenant's death his widow continue in possession, notice to her is presumed to be good until it is shown that probate or letters of administration have been granted to another (*t*): and such notice will even be effectual if a personal representative be subsequently created (*u*). If the demise specifies the persons to whom the notice is to be given, its requirements must be strictly complied with (*x*).

(b) *From the lessee*.—Notice to quit on the part of the lessee must be given by him, or by such person or persons as may be specifically entitled to do so by the terms of the lease; and if there be more than one lessee the notice must express the intention to give up possession on the part of all (*y*). Where power to give notice is reserved to the lessee, "his executors, administrators, and assigns," such notice may only be given by that one of the persons mentioned who for the time being is entitled to the term (*z*).

It should be given to (*a*) his immediate landlord (and not to any head landlord or party under whom his immediate landlord derives his title), or to the person for the time being legally entitled to the immediate reversion (*b*). Or it may be given to a duly authorized agent—for example, a solicitor intrusted with the management of

(*n*) *Seaward v. Drew*, 67 L. J. Q. B. 322. (The notice here, as mentioned *infra*, was not by, but to, the lessor, but the same rule applies.)

(*o*) See per Willes, J., in *Watson v. Swann*, 11 C. B. N. S. 756.

(*p*) As to service, see p. 621, *infra*.

(*q*) *Cole*, Ejec. 45.

(*r*) *Pleasant v. Benson*, 14 East, 234.

(*s*) *Doe v. Williams*, 6 B. & C. 41; *Roe v. Street*, 2 A. & E. 329.

(*t*) *Rces v. Perrot*, 4 C. & P. 230.

(*u*) *Sweeny v. Sweeny*, Ir. R. 10 C. L. 375. According to the judgments in this case the same result will follow whoever may be the person retaining possession after the tenant's death.

(*x*) See *Hogg v. Brooks*, 15 Q. B. Div. 256, cited *infra*, p. 622.

(*y*) *Easton v. Penny*, 67 L. T. 290.

(*z*) *Seaward v. Drew*, 67 L. J. Q. B. 322; cited *supra*, p. 601.

(*a*) As to service, see p. 621, *infra*.

(*b*) *Cole*, Ejec. 46.

the demised property (*c*); but not to a mere collector of rents for the landlord (*d*). Any proviso relating to this matter in the demise must be strictly followed: thus where the notice was to be given to the parties and their assigns, and a mortgagee who had joined in the lease assigned to himself and another, it was held that the notice must be given to both (*e*). So where a demise was made determinable before the end of the term upon the lessees giving a certain notice in writing to the lessor, "his representatives and assigns," and the lessor died devising the property to trustees in trust for his wife, it was held that a notice given to the wife was invalid (*f*). Where the landlord mortgages the premises after demise, and notice of the mortgage is given to the tenant, notice to quit by the latter should be given to the mortgagee (*g*) as assignee of the reversion (*h*); but where the mortgagor is entitled for the time being to receive the rent, and no notice has been given by the mortgagee of an intention to take possession or enter into the receipt of the rents and profits, the notice should, if it is submitted, be given to the mortgagor (*i*).

A tenant who gives notice to quit and fails to give possession on its expiration becomes liable, as will be seen hereafter, to the payment of double rent (*k*).

Form and contents.—The following may be the form of a notice to quit:—

"Sir,—I hereby give you notice to quit [*or that I intend to quit*] and deliver up possession of the house, land, and premises, with the appurtenances, situate at M. in the county of N., which you [*or I*] hold of me [*or you*] as tenant thereof, on the 29th day of September next, or at the expiration of the year of your [*or my*] tenancy which shall expire next after the end of one half (*l*) year from the date of this notice. Dated the — day of — 19—. A. B.—To Mr. C. D."

But no particular form is requisite for the notice; nor, in the absence of any stipulation to that effect, is it necessary (though

(*c*) *Papillon v. Brunton*, 5 H. & N. 518; *Quartermaine v. Selby*, 5 T. L. R. 223.

(*d*) *Pearse v. Boulter*, 2 F. & F. 133.

(*e*) *Quartermaine v. Selby*, *supra*.

(*f*) *Easton v. Penny*, *supra*.

(*g*) See *Burton v. Dickenson*, 17 L. T. 264.

(*h*) See at note (*b*), *supra*.

(*i*) Jud. Act, 1873, s. 25, sub-s. 5.

(*k*) 11 Geo. 2, c. 19, s. 18. See *post*, p. 762.

(*l*) Omit this word if the tenancy is one under the Agricultural Holdings Act, unless that Act has been made not to apply: *supra*, p. 608.

always desirable) that it should be even in writing (*m*). Certain requirements, however, must be complied with.

(1.) It must be addressed to the proper person, *i.e.*, to the immediate tenant or landlord of the giver (*n*). A notice to a corporation should be addressed to the corporation (*o*). An omission, however, to address a notice to quit is cured if notice is proved to have been delivered to the proper person (*p*). In the same way, a mistake in the Christian name of the person (a tenant) to whom it was given was held to be cured by his having kept the notice without objection, there being no other tenant of the name on the property of which the premises demised formed part (*q*). The notice to a tenant need not state to whom possession is to be given (*r*); but if this be stated wrongly it may avoid the notice (*s*).

(2.) The notice should properly describe the premises to which it relates. But any description, however general—as a notice to quit “the premises which you now hold of me, situate at A.” (*t*), or “the house and land you rent of me” (*u*), or “the messuage or tenement we now hold of you” (*x*),—will suffice for this purpose. Nor will a misdescription destroy the validity of a notice unless it be found as a fact that the recipient was misled by it (*y*). The notice, however, must extend to all the premises—if demised at an entire rent—and not to a part only (*z*), unless power to that effect is reserved by the demise (*a*); and this even though the notice is given by an assignee to whom such part has been separately conveyed by the lessor (*b*). But the right of a joint tenant or tenant in common to give notice as to his share of the whole is not affected by this rule (*c*).

A liberal construction will be placed upon the terms of a notice in order, if possible, to defeat the application of the rule requiring it to apply to the whole of the demised premises. Thus the

(*m*) For instances of a parol notice, see *Doe v. Crick*, 5 Esp. 196 (by landlord); *Bird v. Debonvielle*, 2 C. & K. 415 (by tenant); *Roe v. Pierce*, 2 Camp. 96 (by agent).

(*n*) *Supra*, p. 615.

(*o*) *Doe v. Woodman*, 8 East, 228.

(*p*) *Doe v. Wrightman*, 4 Esp. 5.

(*q*) *Doe v. Spiller*, 6 Esp. 70.

(*r*) *Doe v. Foster*, 3 C. B. 215.

(*s*) *Doe v. Fairclough*, 6 M. & S. 40.

(*t*) *Doe v. Furwood*, 3 Q. B. 627.

(*u*) *Doe v. Culiford*, 4 D. & Ry. 248.

As to the actual decision in this case, see p. 620, *infra*.

(*x*) *Doe v. Milward*, 3 M. & W. 328.

(*y*) *Doe v. Anon.*, 4 Esp. 185; *Doe v. Wilkinson*, 12 A. & E. 743.

(*z*) *Doe v. Archer*, 14 East, 245.

(*a*) *Liddy v. Kennedy*, L. R. 5 H. L. 134.

(*b*) *Prince v. Evans*, 29 L. T. 835. In this case it will be noticed that there had been no recognition of the assignee, or consent (see p. 126, *ante*) to the apportionment of rent, by the tenant.

(*c*) *Supra*, p. 613.

expression "Town Barton, &c.," has been held to include lands not strictly so called but commonly held therewith (*d*), and "premises with the appurtenances" to include tithes (*e*). An exception, too, to the rule has been created by the Agricultural Holdings Act (*f*), which allows (*g*) a landlord, with a view to the use of land for certain purposes specified in the section,—such purpose, which is to be stated in the notice, including the erection of cottages or providing of gardens for farm labourers, the opening or working of coal or other mines or pits, the making of roads, railways, canals, wharves, water-courses, &c. (*g*)—to give to his yearly tenant a notice affecting part only of the demised premises; though the tenant may, by counter-notice in writing given within twenty-eight days after the service of such notice, elect to treat it as for the entire holding.

(3.) A notice to quit must be plain and unequivocal in its terms, leaving no doubt as to the intention of the party giving it; and language must be used upon which the other party can safely act (*h*). Thus a notice by a tenant that "I intend to surrender to you the tenancy of this house on or before (*sic*) the 29th of September next" has been held bad on the ground that, as a surrender required the landlord's consent, it left matters at the conclusion of the term contingent on some arrangement being made (*i*).

A notice to quit, again, in its form *merely* optional (*i.e.*, being an intimation that in one event the tenancy may be determined and in another continued) is invalid (*k*). Hence a notice conditional on the recipient doing or abstaining from some act *before its expiration* is bad (*l*); whilst if the condition is one to be performed by a person other than the recipient it is equally invalid (*m*), inasmuch as the latter, who does not know whether it will be performed or not, has not received such a notice as he can safely act upon (*n*). But a notice otherwise sufficiently clear is not vitiated by the addition of an offer of a fresh tenancy from its

(*d*) *Doe v. Archer*, *supra*.

(*e*) *Doe v. Church*, 3 Camp. 71.

(*f*) 46 & 47 Vict. c. 61. As to the tenancies to which the Act applies, see sects. 54, 61; *post*, p. 728.

(*g*) Sect. 41.

(*h*) Per Bowen, L. J., in next-cited case.

(*i*) *Gardner v. Ingram*, 61 L. T. 729. The word "surrender" was apparently deemed to require to be construed in its

technical sense, possibly from the use of the expression "on or before." Cf. note (*y*), *infra*.

(*k*) *Ahearn v. Bellman*, 4 Ex. Div. 201, explaining *Doe v. Jackson*, *infra*.

(*l*) See *Muskett v. Hill*, 5 Bing. N. C. 694, per Tindal, C. J.

(*m*) See *Farrance v. Elkington*, 2 Camp. 591.

(*n*) See last paragraph.

expiration upon different terms, as an alternative, *not to the determination of the tenancy*, but to the actual quitting of the premises (*o*). And even if it be in form conditional, it may still be valid where the condition may be fairly regarded as in effect equivalent to an offer to negotiate for a fresh tenancy. Thus, a letter from a tenant to his landlord complaining of his rent as too high, and, after suggesting a certain sum as the amount which he considered to be in excess of the proper sum, stating "I shall not be able to stop" after a day named "unless some reduction is made" has been held, when followed by negotiations which proved abortive, to operate as a valid notice (*p*). Nor is the validity of a notice affected by the mere addition of a warning as to the consequences of non-compliance, *e.g.*, "I desire you to quit or I shall insist on double rent" (*q*).

It should be observed that a defect in the form of a notice, which prevents the condition under discussion from being fulfilled, may in some cases be cured by acceptance (*r*). Thus, where a tenant wrote during the month of January to his landlord, "I hereby give you notice that I wish to terminate my tenancy," asking at the same time to be informed when it would expire, and the landlord wrote in reply that six months' notice must be given to terminate on the 1st of July, and that the tenant consequently held till the 1st of the following July twelvemonth, it was decided that the notice was valid for that date (*s*).

(4.) A notice to quit, which is given "at the peril of him who gives it" (*t*), must in its form comply with the requirement already mentioned (*u*), by being expressed to expire at the proper time; though if in fact *given* in time, *i.e.*, if of sufficient length, it need not appear on the face of it that such is the case (*x*). If given for the wrong day, it will, as already stated, be invalid although in time for the right one (*y*). But it will be valid if given for two alternative dates and either of them is right (*z*).

(*o*) *Ahearn v. Bellman*, *supra*.

(*p*) *Bury v. Thompson*, [1895] 1 Q. B. 231, 696.

(*q*) *Doe v. Jackson*, 1 Doug. 175; *Doe v. Goldwin*, 2 Q. B. 143. The double rent so claimed should strictly be double "value." See *post*, pp. 757, 762.

(*r*) Per Wills, J., in next-cited case.

(*s*) *General Assurance Co. v. Worsley*, 64 L. J. Q. B. 253.

(*t*) *Doe v. Timothy*, 2 C. & K. 351, per Rolfe, B.

(*u*) *Supra*, pp. 609—613.

(*x*) *Doe v. Timothy*, *supra*.

(*y*) *Doe v. Lea*, 11 East, 812. As to the effect of using the words "on or before" a wrong day (later than the right one), see a somewhat remarkable variety of judicial opinion in *Harvey v. Copeland*, 30 L. R. (1.) 412.

(*z*) *Doe v. Wrightman*, 4 Esp. 5; *Doe v. Scott*, 6 Bing. 362.

Nor is it necessary to specify any particular day for quitting (*a*); general terms, such as "at the expiration of the present year's tenancy" (*b*), or "at such time as your holding shall expire next after the expiration of half a year" (*c*) from the receipt of this notice" (*d*), may, and in the case of uncertainty should, be used either alone or, in the alternative, with the mention of some definite date. But the right day must be indicated either expressly or (as above) by implication (*e*).

The rule has always been to make lame and inaccurate notices sensible and not insensible where the recipient cannot have been misled as to the intention of the giver (*f*). Thus the insertion of a year on the face of the notice impossible, and obviously a mere clerical error (*g*), and the use of the words "present year's holding," where the context rendered the word "present" unmeaning (*h*), have been held not to render the notice invalid. For the same reason a notice to quit "at Michaelmas," which *prima facie* means September 29th, has been held good for a tenancy which commenced at old Michaelmas (October 11th) (*i*). Where, however, in such a tenancy a notice for that date "now next ensuing, or such other day or time as your tenancy may expire on," was given in the month of June, the Court, refusing to construe it as good for October in the following year, held it to be altogether invalid (*k*). And in the same way a notice given in October to a tenant whose term commenced at Martinmas (November 11th) for the "13th of May next ensuing, or on such other day as the current year for which you now hold will expire," was held to be equally ineffective (*l*).

On the other hand, a notice, in a Lady Day tenancy, served on the 24th of March, to quit the ensuing Midsummer day "or at the

(*a*) *Doe v. Butler*, 2 Esp. 589.

(*b*) *Doe v. Timothy*, *supra*.

(*c*) One year if under the Agricultural Holdings Act: *supra*, p. 608.

(*d*) *Hirst v. Horn*, 6 M. & W. 393; *Holme v. Brunskill*, 3 Q. B. Div. 495.

(*e*) *Goode v. Howells*, 4 M. & W. at p. 201, per Parke, B.

(*f*) *Doe v. Smith*, 5 A. & E. 350.

(*g*) *Doe v. Kightley*, 7 T. R. 63.

(*h*) *Doe v. Smith*, *supra*.

(*i*) *Furley v. Wood*, 1 Esp. 198; *Doe v. Vince*, 2 Camp. 256; *Doe v. Perrin*, 9 C. & P. 467; *Denn v. Walker*, Peake, Add. Ca. 194. And see *ante*, p. 104.

(*k*) *Mills v. Goff*, 14 M. & W. 72.

(*l*) *Doe v. Morphet*, 7 Q. B. 577, disapproving *Doe v. Culliford*, 4 D. & Ry. 248. (This latter case appears very imperfectly reported. According to the judgment of Abbott, C. J., the tenancy seems to have been one determinable at Lady Day. On the other hand, Pollock, C. B., in *Mills v. Goff*, *supra*, says that it was a Michaelmas tenancy. The opinion has further been expressed (Cole, Ejec. 52) that the tenancy must have been one determinable at the end of any quarter or half-year upon six months' notice. The case, even apart from what was said of it in *Doe v. Morphet*, *supra*, would hardly seem to be of much authority.)

end of your *current* year's tenancy" has been held a good notice for Lady Day of the following year (*m*). It is thought, however, that there being no inconsistency in the terms of the notice (*n*), and the words being in themselves quite clear, such a notice cannot be made good by putting a strained interpretation on them (*o*), and that the decision can scarcely be regarded as correct. Nor, whilst notices to quit have to be given at all, does it seem a serious hardship that a notice, which gives two alternative dates, and is wrong as to both, should be accounted invalid. The principle (*p*) that "a notice should be so construed that a sensible meaning should be given to it" is one which appears to require some qualification. If the notice, instead of being given one day, had been given ten days before Lady Day, would the same principle apply, and if not, where is the line to be drawn?

Any express provision, too, relating to this matter *in a lease by deed* must always be strictly complied with; thus, where such a lease contained a proviso for notice to expire at Michaelmas, it was held that a notice given for Midsummer "agreeably to the covenants of the lease" was bad, and that the fact that the recipient understood it as referring to Michaelmas was immaterial (*q*).

Notice to a tenant to quit at noon on the proper day is invalid, he being entitled to stay till midnight (*r*), and a wrong hour having for the purpose in question the same operation as a wrong day (*s*).

Attestation is not requisite in a notice to quit, and therefore an attested notice may be proved without calling the attesting witness (*t*).

Service.—Personal service is not necessary (*u*). A notice is well served if it be delivered to an agent of the recipient duly authorized to receive documents of such a description on his behalf (*x*); and such agency is primarily a question of fact (*y*). Thus service on the solicitor acting in the administration of a deceased tenant's estate has been held good (*z*). So, on the other hand, service of

(*m*) *Wride v. Dyer*, [1900] 1 Q. B. 23. The Court professed to follow *Doe v. Culliford*, *supra*, notwithstanding what has just been pointed out.

(*n*) As in *Doe v. Smith*, *supra*, on which Darling, J., relies.

(*o*) See per Lord Denman, C. J., in *Doe v. Morphett*, *supra*.

(*p*) *Wride v. Dyer*, per Ridley, J., 81 L. T. 453.

(*q*) *Cadby v. Martinez*, 11 A. & E. 720.

(*r*) *Page v. More*, 15 Q. B. 684.

(*s*) *Id.*, per Lord Campbell, C. J.

(*t*) 28 & 29 Vict. c. 18, s. 7, which (see sect. 1) applies to all Courts of Judicature.

(*u*) *Jones v. Marsh*, 4 T. R. 464.

(*x*) *Tanham v. Nicholson*, L. R. 5 H. L. 561.

(*y*) Cf. *supra*, p. 614.

(*z*) *Doe v. Ongley*, 10 C. B. 25.

notice upon a domestic servant of the landlord at his house has been held ineffectual (*a*). In the special case, however, where the service is upon the tenant's wife or servant at his dwelling-house, whether such house form part of the demised premises (*b*) or not (*c*), such agency and authority will be implied from the relationship of the parties (*d*). It was formerly thought that such implication was conclusive, and that a landlord's duty was completely discharged by leaving the notice with a servant at his tenant's dwelling-house (*e*) (though not by merely leaving it at such house (*f*), unless it could be shown that it actually reached the tenant (*g*)); the rule, however, seems now to be that it can be rebutted, but only by producing evidence to show that the agency was not correctly implied (*h*). And once agency is established it is immaterial whether the notice come to the tenant's knowledge in time or at all; for service on the agent is equivalent to service on the principal (*h*).

If the notice be properly addressed to the tenant or expressly left for him (*i*), it seems to be unnecessary to explain its contents (*k*). If a notice be sent through the post, it is presumed to have been delivered at the proper time and place in the ordinary course, until it is proved that such was not the fact (*l*); and a notice posted in time for delivery within business hours (and found to have arrived within them) at the office of the landlord's solicitor was held good, though through absence the latter did not get it until the following day, service on which would have been too late (*m*).

If the demise specifies the persons upon whom the service is to be made, its requirements must be strictly complied with. Hence, where the proviso was for notice to be delivered to the tenant or his assigns, and the tenant after making an underlease disappeared and could not be found, it was held that neither a written notice sent by post to his last known address, and returned undelivered, nor notice served upon the underlessee, was sufficient (*n*). Notice

(*a*) *Wilson v. Chisholm*, 4 C. & P. 474.

(*b*) *Tanham v. Nicholson*, *supra*.

(*c*) *Jones v. Marsh*, *supra*.

(*d*) *Tanham v. Nicholson*, *supra*, per Lord Hatherley, L. C.; *London (School Board for) v. Peters*, 18 T. L. R. 509.

(*e*) *Jones v. Marsh*, *supra*; *Doe v. Dunbar*, Moo. & M. 10; *Smith v. Clark*, 9 Dowl. 202.

(*f*) *Doe v. Lucas*, 5 Esp. 153.

(*g*) *Alford v. Vickery*, Car. & M. 280.

(*h*) *Tanham v. Nicholson*, *supra*, per

Lord Hatherley, L. C. (Lord Westbury, however, seems to incline to the principle laid down in the earlier cases.)

(*i*) *Liddy v. Kennedy*, L. R. 5 H. L. 184.

(*k*) *Tanham v. Nicholson*, *supra*.

(*l*) *Gresham House Co. v. Rosa Grande Gold Co.*, W. N. 1870, p. 119, cited Roscoe, N. P. 1006 (17th ed.).

(*m*) *Papillon v. Brunton*, 5 H. & N. 518. See per Bramwell and Wilde, BB.

(*n*) *Hogg v. Brooke*, 15 Q. B. Div. 256.

to a corporation should be served upon its officers (*o*), and in the case of an incorporated company may be given by post-letter directed to the principal office, or personally to the secretary (*p*). If the demise is to several as joint tenants, service upon one of them is sufficient (*q*). But the question whether a notice served upon one of two joint tenants on the premises had not reached the other has been left as one of fact to the jury (*r*).

That a notice has been properly served may be inferred from the admissions or subsequent conduct of the recipient (*s*). But it is always well for the person serving it at once to indorse a memorandum of the fact and time of service upon a duplicate, as in case of his death this indorsement will be admissible in evidence (*t*), provided it has been made in the ordinary course of business (*u*); and a copy will be admissible even without notice having been given to produce the original (*x*).

The Agricultural Holdings Act (46 & 47 Vict. c. 61), provides (*y*) that a notice under the Act "may be served on the person to whom it is to be given either personally or by leaving it for him at his last known place of abode in England, or by sending it through the post in a registered letter addressed to him there; and if so sent by post it shall be deemed to have been served at the time when the letter containing it would be delivered in ordinary course; and in order to prove service by letter it shall be sufficient to prove that the letter was properly addressed and posted and that it contained the notice . . . to be served." The statutory notice to quit is a notice "under the Act" within the above provision (*z*).

Operation.—A valid notice to quit once given is effectual both for and against successors in title of either party (*a*); and it determines not only the original demise but any underlease which the tenant may have made (*b*). The tenant will be himself liable to proceedings in ejectment, as well as his undertenant, if the latter continue in occupation after the notice to the tenant has expired (*c*);

(*o*) *Doe v. Woodman*, 8 East, 228.

(*p*) 8 & 9 Vict. c. 16, s. 135.

(*q*) *Doe v. Crick*, 5 Esp. 196.

(*r*) *Doe v. Watkins*, 7 East, 551.

(*s*) *Doe v. Hall*, 5 M. & Gr. 795.

(*t*) *Doe v. Turford*, 3 B. & Ad. 890.

(*u*) *Stapylton v. Clough*, 2 E. & B. 933.

(*x*) *Doe v. Somerton*, 7 Q. B. 58.

(*y*) Sect. 28.

(*z*) *Van Grutten v. Trevenen*, [1902] 2 K. B. 82. As to the holdings to which the Act applies, see ss. 54, 61, *post*, p. 728.

(*a*) *Doe v. Forwood*, 3 Q. B. 627; *Doe v. Terry*, 4 A. & E. 274; *Doe v. Cockell*, *id.*, 478; *Doe v. Hellings*, 6 Jur. 821.

(*b*) *Pleasant v. Benson*, 14 East, at p. 286, per Le Blanc, J.

(*c*) *Roe v. Wiggs*, 2 N. R. 330.

and to the costs of the ejectment as well as for the value of the whole premises for the time the landlord is kept out of possession (*d*).

Though the language of a notice must be construed by reference to its date, its operation can only date from its service (*e*).

It is hardly necessary to say that a notice to quit does not absolve the tenant from the performance of his covenants (*f*).

There is no objection in law to a stipulation that the tenant shall be allowed a reasonable time after the expiration of a notice to quit for the purpose of removing his goods from the premises (*g*), or to a custom to a like effect in the lease of a quarry for the purpose of permitting him to get stone (*h*).

Waiver.—A notice to quit cannot strictly speaking be “waived”; for once a valid notice is given, the tenancy will inevitably be determined upon its expiration (*i*). But though the parties cannot waive the notice, they may waive the right to enforce actual quitting, by mutually agreeing upon a new tenancy, whether on the terms of the former or not, to commence from the time of its expiration (*k*). And a mutual agreement to this effect may be implied from their acts, which in every such case may be regarded as amounting either to an offer, or to an acceptance, of a new tenancy. Thus an unconditional withdrawal of a notice to quit is really an offer to grant or take, from the time of its expiration, a new tenancy on the terms of the former. Such offer the recipient may accept, or he may insist upon quitting; or if fresh terms have been previously offered by the recipient, such withdrawal may amount to an acceptance of them (*k*). It follows that it is only where the rights or liabilities of a third party, *e.g.*, a surety for the performance of the covenants of the lease, come in question that the distinction becomes material.

The most usual employment, however, of the term “waiver” is

(*d*) *Henderson v. Squire*, L. R. 4 Q. B. 170; *post*, p. 757.

(*e*) See, *e.g.*, *Papillon v. Brunton*, 5 H. & N. 518; *Wordsley Brewery Co. v. Halford*, 90 L. T. 89.

(*f*) *Gregory v. Wilson*, 9 Hare, 683.

(*g*) *Cornish v. Stubbs*, L. R. 5 C. P. 384.

(*h*) *Vint v. Constable*, 25 L. T. 324, per Malins, V.-C.

(*i*) *Tayleur v. Wildin*, L. R. 3 Ex. 303 (distinguish *Holme v. Brunskill*, 3 Q. B.

Div. 495, where the tenancy did not continue after the earliest date for which the notice was effectual); *Giddens v. Dodd*, 8 Drew. 485. The C. A. in Ireland, however, has declined to adopt the above view: *Inchiquin (Lord) v. Lyons*, 20 L. R. (I.) 474. It may be mentioned that the word “waived” is used in relation to a notice to quit in s. 59 of the Agricultural Holdings Act (46 & 47 Vict. c. 61); *post*, p. 732.

(*k*) *Tayleur v. Wildin*, *supra*, per Kelly, C. B., and Bramwell, B.

in cases, not where there has been any withdrawal of the notice or negotiations for a fresh tenancy before its expiration, but where the tenant not having quitted at the time fixed by it, there has merely been some act by the parties *at a subsequent period* indicating an intention to treat the tenancy as still on foot. In these cases the principle just referred to applies with even more force, because it is clear that, the former tenancy having already expired, the only tenancy that *could* be implied is a new one.

With the explanation above given, the use of the word is retained here for the sake of convenience. What acts on either side amount to a waiver of a notice after its expiration is ordinarily a mixed question of law and fact; the intention with which the act was done being for a jury, and its legal effect for the Court, to decide. If the tenant, for instance, pay money *as rent* accrued after the expiration of the notice, and the landlord (*l*), or his agent being specially authorized in that behalf (*m*), accept it as such, this is conclusive evidence of a waiver; nor would it apparently make any difference if it were accepted by the landlord under protest and without prejudice to his rights (*n*). But if it be disputed whether such money was paid and accepted as rent (*o*), or if a mere demand for payment (not responded to) have been made by the landlord (*p*), the *quo animo* is for the jury. A distress, however, made by the landlord for rent falling due after the expiration of the notice is so strong an assertion of the existence of a tenancy as to admit of no question of his intention (*q*); though if the tenant repudiate his right to make it (*r*), this negatives the implication of a mutual agreement for a renewed tenancy (*s*), which his submission to the distress, on the other hand, would affirm (*t*). But the receipt of rent (whether under a distress or otherwise) due *before or on* the expiration of the notice cannot operate as a waiver (*u*),—and this even though the rent be received or the distress be made (under the stat. 8 Anne, c. 14, s. 6 (*x*)) after such expiration; for from that act an agreement for a new tenancy is not to be implied.

(*l*) *Goodright v. Cordwunt*, 6 T. R. 219.

(*m*) *Doe v. Calvert*, 2 Camp. 387.

(*n*) See *Davenport v. R.*, 3 App. Ca. 115, and *Croft v. Lumley*, 6 H. L. C. 672, cited p. 652, *post*. In *Doe v. Fuller*, Tyr. & G. 17, it was held that a stipulation to that effect by the landlord did not require a stamp as an agreement.

(*o*) *Doe v. Batten*, Cowp. 243.

(*p*) *Blyth v. Dennett*, 13 C. B. 178.

(*q*) *Zouch v. Willingale*, 1 H. Bl. 311.

(*r*) *E.g.*, by taking proceedings in replevin: see *ante*, p. 584.

(*s*) *Blyth v. Dennett*, *supra*, per Jervis, C. J.

(*t*) *Panton v. Jones*, 3 Camp. 372.

(*u*) See *Price v. Worwood*, 4 H. & N. 512, and *post*, pp. 651 *et seq.*

(*x*) *I.e.*, within six months (assuming the statute to apply); *ante*, p. 514.

The circumstance that the rent, the receipt of which is relied upon as an act of waiver, is rent which has only accrued after the issue of a writ to recover possession of the premises, is immaterial (*y*). And after a verdict in ejectment against a tenant for not quitting pursuant to notice, a distress levied for rent subsequently due, though not a ground in itself for setting aside the verdict, may furnish evidence of the existence of a new tenancy (*z*).

If, after a notice to quit, a second notice be given for a later date, this raises against the giver the presumption of a subsisting tenancy (*a*). But this presumption may be rebutted, either by the language of the second notice itself, as where it is in effect a demand for possession (*b*) (*e.g.*, notice to quit in fourteen days, "otherwise I shall require double value" (*c*), or notice to quit on a subsequent day "or pay double rent" (*d*)), or by other circumstances, such as proceedings in ejectment already commenced, which are clearly inconsistent with an intention to treat the recipient as a tenant (*e*).

The mere fact that the tenant holds over is not in itself a waiver of a notice to quit given by him (*f*), for it does not necessarily follow that he intends to continue as tenant (*g*); and *à fortiori* where the holding over is merely temporary and accidental, as where, by inadvertence, the key of the premises was retained for two days (*h*). It is, however, evidence of a waiver proper to be submitted to a jury (*i*). So, on the other hand, the mere holding over by him after a notice to quit from the landlord does not amount to a waiver by the latter without some other evidence of a new tenancy between the parties (*k*). Where again, after notice to quit, the landlord by way of indulgence allows his tenant to hold over provisionally, this merely suspends his remedy by ejectment, but is no waiver of the notice; and if the indulgence does not amount to more than a conditional licence, and the tenant refuses to quit when it ends, he may be treated as a trespasser from the

(*y*) *Doe v. Batten*, *supra*. As to implication of new tenancy under such circumstances in forfeiture, see *post*, p. 656.

(*z*) *Doe v. Darby*, 8 Taunt. 538.

(*a*) *Doe v. Palmer*, 16 East, 53.

(*b*) *Supra*, p. 600.

(*c*) *Doe v. Steel*, 3 Camp. 115. As to "double value," see p. 757, *post*.

(*d*) *Messenger v. Armstrong*, 1 T. R.

53. This should be double value: see *post*, pp. 757, 762.

(*e*) *Doe v. Humphreys*, 2 East, 257.

(*f*) *Jenner v. Clegg*, 1 Moo. & R. 213.

(*g*) *Ante*, p. 394.

(*h*) *Gray v. Bompas*, 11 C. B. N. S. 520.

(*i*) *Jones v. Shears*, 4 A. & E. 832.

(*k*) *Alford v. Vickery*, Car. & M. 280.

date of the expiration of the notice (*l*). Nor does the fact that rent has been paid in respect of the time of holding over in itself make any difference (*m*). And if after a valid notice to quit has been given the parties make a conditional agreement for a new tenancy, the notice will, upon breach of the condition (either express or even only implied), revive and be of full force (*n*).

The term "waiver of notice" has sometimes been used in those cases where the parties to a tenancy enter into an agreement, whilst the tenancy is running, to renounce the notice to which they are entitled and accept another (usually a shorter) notice in its place. It has, however, more than once been decided that such an agreement (*o*) is not binding on either party, even though it may have been acted upon by one or both, so long as what has been done does not amount to a surrender (*p*). Thus where a tenant from year to year gave his landlord three months' notice, which the latter, thinking, as it would seem, it was only a quarterly tenancy, accepted, it was held that though both parties had acted upon it (*q*), the landlord was entitled to repudiate it afterwards (*r*). So where a short notice to quit was accepted by the landlord, who thereupon relet the premises to another person by public auction, it was held that the new tenant not having been let into possession (and there having consequently been no surrender (*s*)), the former tenant was entitled to resist ejectment, even though he had himself bid for the premises at the auction (*t*). The point, however, does not seem to have been raised in this latter case, as it has successfully in a modern authority (*u*), that the tenant, by his conduct in causing the landlord to incur a binding obligation to the new tenant, was

(*l*) *Whitecore v. Symonds*, 10 East, 13.

(*m*) *London (School Board for) v. Peters*, 18 T. L. R. 509, where the tenancy was quarterly, the holding over for one year, and the payment of rent for that time in one lump sum.

(*n*) *Doe v. Hunt*, 1 M. & W. 690.

(*o*) It need hardly be pointed out that the agreements here referred to are only those entered into *after* the notice has been given. There seems nothing to prevent the parties from validly agreeing as to the length of the notice (see p. 604, *supra*) at any moment until notice is actually given.

(*p*) *Johnstone v. Hudleston*, 4 B. & C.

922 (explaining *Shirley v. Newman*, 1 Esp. 266), and cases next cited.

(*q*) The landlord seems to have withdrawn his assent to the notice before its expiration, and upon the tenant's quitting it is stated that he "entered and . . . did some repairs." See the case cited *post*, p. 638.

(*r*) *Bessell v. Landsberg*, 7 Q. B. 638. Cp. *Doe v. Milward*, 3 M. & W. 328, cited *supra*, p. 609.

(*s*) *Post*, pp. 640, 641.

(*t*) *Doe v. Johnston*, M'Cl. & Y. 141.

(*u*) *Fenner v. Blake*, [1900] 1 Q. B. 426, cited *post*, p. 632, where the question of estoppel is dealt with in some detail.

estopped from saying that his interest was one which continued beyond the expiration of the notice. Moreover, there exists reason for thinking, as will presently be pointed out, that agreements for notice to quit of the kind here referred to may now (subject to the Statute of Frauds) enure as valid agreements for surrender (*x*).

(*x*) See pp. 632, 633, *post*.

CHAPTER IV.

SURRENDER.

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A surrender is a yielding up an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may merge by mutual agreement (a). It is thus seen to be founded, like a lease, upon contract, being an act done by the lessee (b), and accepted by the reversioner (c). Surrender is of two kinds, express—i.e., by deed, or by express words—and implied, by act and operation of law (d).

The present chapter will deal accordingly with (I.) express surrender: (II.) surrender by operation of law:—to which will be added some observations on the effect of surrender.

I. EXPRESS SURRENDER.

Form.—Any form of words whereby an agreement as above stated may appear will be sufficient to work a surrender (e). But by the Statute of Frauds all *express* surrenders of leases—surrenders by operation of law are in terms exempted—are required to be by deed, or in writing signed by the surrenderor or his agent authorized by writing (f): a provision which applies even to leases

(a) Co. Lit. 337 b.

(b) For such yielding up must proceed from him: see Co. Lit. *ubi sup.*

(c) See *Gardner v. Ingram*, 61 L. T. 729, per Lord Coleridge, C. J.

(d) Co. Lit. 338 a.

(e) *Farmer v. Rogers*, 2 Wils. 26; *Challoner v. Davies*, 1 Ld. Ray. 400; *Bac. Ab. Leases* (S. 1, 1).

(f) 29 Car. 2, c. 3, s. 3.

not created by written instruments (*g*). And a surrender in writing of a lease which cannot be created without a written instrument (*i.e.*, a lease of which the term exceeds three years (*h*)) is now void at law unless made by deed (*i*). But following the analogy in the making of leases (*k*), it would seem that a surrender not by deed would be only void *as* a surrender, but valid as an agreement to that effect (*l*).

The Statute of Frauds having thus specifically pointed out how express surrenders are to be made, it is held that cancellation of a lease by mutual consent (*m*) (*e.g.*, by tearing off the seals (*n*) or the names of the parties (*o*)) affords no presumption of a note in writing; and cannot, therefore, operate as an express surrender within the statute (*p*). Nor is a mere recital in a second lease to the same lessee, that it was granted partly in consideration of the surrender of a prior lease of the same premises, a surrender by deed or writing within the statute, inasmuch as it does not purport to be of itself a yielding up of the interest of the lessee, and its terms are consistent with the surrender of the prior lease being by operation of law (*q*).

Parties.—Persons capable of making leases (*r*) (and no others) may surrender (*s*). To make an express surrender it is necessary to be in possession (*t*); hence, a lessee cannot surrender before entry (*u*), though when once he has entered and so severed the possession from the reversion, this rule does not apply to an assignee, as possession for this purpose is transferred to him by the mere fact of assignment (*u*). But an assignee can, of course, only surrender if he is for the time being entitled to the term (*x*). For surrender to be effectual the lessee must not reserve to himself any part of his interest (*y*). .

Persons capable of taking leases (*z*) (and no others) may accept surrenders (*a*). The acceptance of surrenders by tenants for life,

(*g*) *Taylor v. Chapman*, Peake, Add. Ca. 19.

(*h*) *Ante*, p. 10.

(*i*) 8 & 9 Vict. c. 106, s. 3.

(*k*) See *ante*, p. 11.

(*l*) As to this, see p. 632, *infra*.

(*m*) *Roe v. Archbishop of York*, 6 East, 86; *Wootley v. Gregory*, 2 Y. & J. 536; *Ward (Lord) v. Lumley*, 5 H. & N. 87.

(*n*) See *Walker v. Richardson*, 2 M. & W. 882; *Davison v. Gent*, 1 H. & N. 744; cited *infra*, p. 641.

(*o*) *Doe v. Thomas*, 9 B. & C. 288.

(*p*) *Id.* As to the effect of cancellation as a surrender by operation of law, see *infra*, p. 641.

(*q*) *Roe v. Archbishop of York*, *supra*.

(*r*) See *ante*, pp. 23 *et seq.*

(*s*) Shep. Touch. 303.

(*t*) Co. Lit. 338 a.

(*u*) Bac. Ab. Leases (S. 2, 2).

(*x*) *Seaward v. Druce*, 67 L. J. Q. B. 322, per Channell, J.

(*y*) *Burton v. Barclay*, 7 Bing. 745.

(*z*) See *ante*, pp. 66 *et seq.*

(*a*) Shep. Touch. 303.

&c., of settled land is specially provided for by statute (*b*). Such surrender need not necessarily be express, but may be implied, in the manner to be presently explained (*c*), from the relinquishment of possession by the lessee and its acceptance by the lessor (*d*). A surrender must be made to the owner of the immediate legal reversion (*e*), whether his estate be one for life or for years, even if only for a term of years shorter than the lease (*f*). Hence, where the lessee underlets, the underlessee cannot surrender to the lessor (*g*), as there is a want of privity between them (*h*); but he may join with the lessee in a surrender (*i*), or the lessee may first surrender his interest to the lessor, whereby the latter acquires the immediate reversion, and a surrender by the underlessee to him thereupon becomes valid (*k*). So, again, a mortgagor who has granted a lease under the provisions of the Conveyancing Act (*l*), not being the person in whom the reversion expectant on the lease is vested (*m*), cannot accept a surrender (*n*). It also follows from the same principle that where a lessor after granting a lease to one person grants another lease of the same premises in reversion (*i.e.*, to commence upon the termination of the former), the proper person to accept a surrender from the first lessee is the original lessor (*o*); while if the lease subsequently granted be concurrent with the first (so that during the continuance of the first it operates to pass the reversion (*p*)), such person is the subsequent lessee (*q*).

Future, conditional, and partial surrenders.—An express surrender cannot, as it has been held, be made to take place *in futuro* (*r*); though, as will be seen presently, a surrender by operation of law may take place by the grant of a lease only to take effect on the happening of a given event (*s*). Hence it has frequently been decided that an invalid notice to quit cannot operate as a surrender, though in writing (*à fortiori* if only by

(*b*) 45 & 46 Vict. c. 38, ss. 13 (1), 31.

(*c*) *Infra*, p. 637.

(*d*) *Easton v. Penny*, 67 L. T. 290, per Romer, J.

(*e*) Co. Lit. 337 b; *Cornish v. Searell*, 8 B. & C. 471; *Southwell v. Scotter*, 49 L. J. Q. B. 356.

(*f*) *Hughes v. Robotham*, Cro. Eliz. 302; Bac. Ab. Leases (S. 1, 2).

(*g*) Bac. Ab. Leases (S. 2, 1).

(*h*) Shep. Touch. 303.

(*i*) *Paramour v. Yardley*, Plowd. at p. 541.

(*k*) Bac. Ab. Leases (S. 2, 1).

(*l*) 44 & 45 Vict. c. 41, s. 18.

(*m*) *Ante*, p. 63.

(*n*) *Robbins v. Whyte*, [1906] 1 K. B. 125. The same result would apparently ensue in the ordinary case where, after a lease has been granted, the lessor mortgages his interest in the premises.

(*o*) See *Smith v. Day*, 2 M. & W. 684.

(*p*) *Ante*, p. 20.

(*q*) *Edwards v. Wickwar*, L. R. 1 Eq. 403, per Wood, V.-C. As to the actual decision in this case, however, see p. 463, *ante*.

(*r*) *Doe v. Milward*, 3 M. & W. 328; *Weidall v. Capes*, 1 M. & W. 50.

(*s*) *Infra*, p. 635.

parol (*t*)) and accepted by the party to whom it is given (*u*); but if it be acted upon by the tenant quitting and the landlord accepting possession the result will be a surrender by operation of law (*x*).

An agreement, however, by a tenant to surrender his interest at a future date, even though only entered into by parol, has been held, where the landlord had altered his position on the faith of it—he had sold his interest to a third party with a right to possession as from the time in question,—to be enforceable by aid of the principle of estoppel (*y*), preventing the determination of the tenancy at such time from being disputed (*z*). It would seem, however, in this case to have escaped attention that the doctrine of estoppel by representation, as is now well established, is applicable only to representations as to some state of facts alleged to be at the time actually in existence (*a*). Now the only such representation by the tenant that can be suggested is that the estate or interest possessed by him was one which merely extended to the agreed date; and this appears to be rather a question of law (*b*), and one as to which at all events the landlord had precisely the same knowledge as himself, and which (it is thought) cannot therefore properly give rise to an estoppel. The truth seems to be that the representation (if any) really made by the tenant was not one as to existing fact at all, but a mere promise *de futuro*—to give up possession at the agreed date,—and this, if binding in any way, could only be binding *as a contract* (*c*). And it is submitted that (apart altogether from any question of alteration of position on the faith of the agreement) *any* contract to surrender a tenancy at a future date is now enforceable, by means of the remedy by specific performance and of the power, given to all courts under the Judicature Acts (*d*), to order a proper deed of surrender to be executed at the stipulated time: and that the difficulty just adverted to which was formerly felt by courts of common law as to surrenders *in futuro* no longer exists.

(*t*) *Johnstone v. Hudlestone*, 4 B. & C. 922; *Doe v. Johnston*, M.C. & Y. 141.

(*u*) *Doe v. Milward*, *supra*; *Bessell v. Landsberg*, 7 Q. B. 638.

(*x*) *Infra*, p. 637.

(*y*) As to the other ground on which the case (next cited) was decided, see *infra*, p. 635.

(*z*) *Fenner v. Blake*, [1900] 1 Q. B. 426.

(*a*) See *Maddison v. Alderson*, 8 App. Ca. at p. 473, per Lord Selborne, L. C.

See also Pollock on Contracts (7th ed.), pp. 523—525, and App. K.

(*b*) As to the question—one of fact—whether there was a new tenancy between the parties, see p. 635, *infra*. It does not seem material on the point as to estoppel.

(*c*) *Maddison v. Alderson*, *ubi sup.*

(*d*) See R. S. C. 1883, O. 42, r. 30; Jud. Act, 1884 (47 & 48 Vict. c. 61), s. 14; and cf. *ante*, p. 166.

There is, however, a further point to be considered in regard to the case under discussion. If the matter, as just explained, is one resting wholly in contract, it clearly falls within the 4th section of the Statute of Frauds. It is possible, however, that, the real contract alleged in this case being that the tenancy should terminate at the agreed date *unless in the meantime another tenant were found* (e), the steps taken by the landlord in putting up, with the tenant's permission, a notice-board on the premises stating that they were to let (e) might properly be regarded as a part performance by him sufficient to take the case out of the statute (f); and it is submitted that, at all events, this is the only ground on which a decision in favour of the landlord can really be rested. In cases where the agreement alleged is to surrender at a named time and nothing more, and where consequently no act other than acceptance of possession has to be done by the landlord (so that the doctrine of part performance cannot apply), it is submitted that the absence of writing would be fatal (g), however much, induced by the tenant's promise, he may have "altered his position" with regard to the premises.

An express surrender may be *conditional* (h), and if the condition annexed be broken the effect will be to revest the estate (i). So, where a tenant entered into an agreement to surrender his term for a particular purpose to be effected, and such purpose was not effected, it was held that the term still continued, as there had been no surrender (k).

An express surrender may be made of *part* of the demised premises only (l), or of part in the name of the whole (m); nor is an agreement to surrender the demised premises invalidated by containing a stipulation allowing the tenant to hold over one portion of them and to have the joint use with the landlord of another portion for a specified time without paying rent (n).

(e) *Fenner v. Blake*, *supra*. See at p. 426 of the report.

(f) See *ante*, pp. 360—365. Cp. *Inman v. Stamp*, 1 Stark. 12, where, on a verbal agreement for the letting of apartments, it was contended on the part of the landlord that the taking down of a notice-board at the tenant's request was a sufficient part performance,—a contention rejected by Lord Ellenborough, C. J., on the ground that the act relied upon had been done before the time had arrived for taking possession.

(g) *Doe v. Johnston*, M'Ct. & Y. 141 (cited *ante*, p. 627), affords an instance

in point, and for the reasons just given it is not thought that courts in the exercise of equitable jurisdiction would now decide the case otherwise.

(h) And so may a surrender in law: *infra*, p. 635.

(i) Co. Lit. 218 b.

(k) *Coupland v. Maynard*, 12 East, 134.

(l) *Holme v. Brunskill*, 3 Q. B. Div. 495. As to surrender by granting a new lease of part, see p. 636, *infra*.

(m) *Pleasant v. Benson*, 14 East, 234, per Lord Ellenborough, C. J.

(n) *Williams v. Sawyer*, 3 B. & B. 70.

Where a lease is expressly surrendered in consideration of a new lease being granted, the fact that such new lease is voidable, and is afterwards avoided, does not revive the former lease, because the surrender of that lease still holds good (*o*).

Stamp.—A surrender (not being of copyholds) must, if not chargeable with duty as a conveyance on sale or mortgage, bear a ten shilling stamp (*p*). If unstamped, a document purporting to be a surrender, as distinguished from a mere disclaimer or renunciation of title (*q*), will not be admissible in evidence (*r*).

II. SURRENDER BY OPERATION OF LAW.

Surrenders by act and operation of law are, as already stated (*s*), excepted from the Statute of Frauds, and as the 8 & 9 Vict. c. 106, s. 3 (*t*), only applies to surrenders in writing, they still exist in full force. They may be considered under two heads: (1) Surrender by acceptance of a new interest; (2) Surrender by relinquishment of possession.

(1.) **By acceptance of new interest.**—The most usual instance of this is where a lessee during the continuance of his demise accepts a fresh lease of the premises from the reversioner. The reason why this operates as a surrender is that the lessee, by accepting the new lease, has been party to an act the validity of which he is by law afterwards estopped from disputing (*u*), and which would not be valid if the first lease continued to exist; and as the lessor could not grant the new lease until the prior one had been surrendered, the acceptance of such new lease is of itself a surrender of the former (*x*). It is immaterial that the new lease is for a less term than the first (*y*), or that it commences only at a future day (*z*), or that it is created (where such creation is valid (*a*)) by parol though the first lease was created by deed (*b*). By its acceptance the former lease is surrendered immediately (*c*). But where the new lease is only to take effect on the happening of

(*o*) *Doe v. Bridges*, 1 B. & Ad. 847.
Secus, in the case of surrender in law:
infra, p. 636.

(*p*) 54 & 55 Vict. c. 39, 1st sched.

(*q*) See *ante*, p. 598.

(*r*) *Doe v. Stagg*, 5 Bing. N. C. 564.

(*s*) *Supra*, p. 629.

(*t*) *Supra*, p. 630.

(*u*) See *ante*, p. 473.

(*x*) *Lyon v. Reed*, 13 M. & W. 285.

(*y*) *Ive's case*, 5 Co. 11 a.

(*z*) *Id.*; *Hutchins v. Martin*, Cro. Eliz. 605.

(*a*) *Ante*, p. 10.

(*b*) Com. Dig. Surrender (I. 1).

(*c*) Bac. Ab. Leases (S. 2, 1).

an event which is uncertain, the surrender is conditional upon the happening of the event during the continuance of the first lease, and thus operates as a surrender only of the remainder of that term (*d*).

Where in a yearly holding from Lady Day the tenant, desiring (in the month of December) to quit at an earlier date than that for which he could then give a valid notice, entered into a verbal agreement to surrender at the following Midsummer, it was held that such agreement amounted to the acceptance of a new tenancy ending at Midsummer, and that such new tenancy worked a surrender of the former by operation of law (*e*). It is, however, submitted that the implication of a new tenancy from an alteration of the date of determination of an existing one stands (as was indeed said) (*f*) on the same footing as the implication from an alteration of the rent (*g*): that what has to be looked at in deciding the question is the real intention of the parties (*h*): that it is clear that no such intention existed in this case (*i*): and that the only ground on which the decision can be supported is that to which reference has already been made (*k*).

An agreement of which specific performance will be given stands, for the purpose of working a surrender of a prior lease, on the same footing as an actual lease (*l*), though before the Judicature Acts (*m*) this was different (*n*). But where a landlord for valuable consideration agreed, but only by parol, not to disturb the possession of his yearly tenant during a period which, though less than three years, exceeded one year, it was held that such parol agreement could not be enforced by reason of the Statute of Frauds, and that as no new demise was ever intended by the parties there was no surrender (*o*). And the agreement must be between the lessor and lessee; for a mere agreement of the lessor

(*d*) *Bac. Ab. Leases* (S. 2, 1).

(*e*) *Fenner v. Blake*, [1900] 1 Q. B. 426.

(*f*) *Per Channell, J.*, in last-cited case.

(*g*) See pp. 639, 640, *infra*.

(*h*) See *Sidebotham v. Holland*, [1895] 1 Q. B. at p. 385, *per Lindley, L. J.*

(*i*) It is not thought that the County Court judge who tried the case can have found such intention as a fact, since both Channell and Bucknill, J.J., state that this was the "effect" of the evidence. According to the report in 69 L. J. Q. B. 257, the plaintiff's own evidence was that

by the agreement the defendant was to "remain tenant" till Midsummer.

(*k*) See p. 633, *supra*. It may be observed that precisely the same point was taken unsuccessfully by Parke, B., when arguing at the bar for the defendant in *Johnstone v. Huillestone*, 4 B. & C. at p. 931.

(*l*) *Ex parte Vitale*, 47 L. T. 480.

(*m*) See *ante*, p. 13.

(*n*) *Foquet v. Moor*, 7 Exch. 870

(*o*) *Sidebotham v. Holland*, [1895] 1 Q. B. 378. The circumstance that the consideration had been executed by the tenant was held to be immaterial.

with a stranger that the lessee shall have a new lease is not sufficient (*p*). So where a tenant entered into an agreement to purchase the land he occupied, it was held that such agreement, being impliedly conditional on a good title being made, could not operate as a surrender (*q*).

The acceptance of a new lease of part only of the demised premises operates as a surrender of that part and no more (*r*). And where one only of two or more lessees for life or years accepts a new lease, it is a surrender only of his share (*s*).

In order to work a surrender in all the foregoing cases the new lease must be capable of passing an interest *according to the contract between the parties* (*t*). Hence, if it be altogether void, there is no surrender of the former lease (*u*). If the new lease be voidable and afterwards avoided, a distinction must be observed: for it may either be avoided *according to the intention of the parties* (*e.g.*, where it is granted on condition and avoided for a breach thereof (*v*)), or it may be avoided *contrary to their intention* (*e.g.*, where it turns out to be an invalid execution of a power, statutory (*x*) or otherwise (*y*), and is avoided for that reason). In the former case the acceptance of the new lease operates as a surrender of the first (*z*). But in the latter case there is no surrender, though the new lease may have operated to pass part of the term contracted for, because it did not pass an interest according to the contract (*a*); nor does it make any difference that it has been granted in consideration of the surrender of the former lease thereby expressly declared to be made and accepted (*b*). The intention of the parties is therefore what must be looked at; so that where the new lease was invalid under a power in the exercise of which it clearly appeared that it had been the intention to grant it, its acceptance was held no surrender of the former lease, even though it might have validly passed an interest out of the life estate of the grantor (*c*). And from the fact that the validity of the surrender, as just seen, is conditional on the validity of the new lease, it

(*p*) *Perry v. Allen*, Cro. Eliz. 173.

(*q*) *Doe v. Stanion*, 1 M. & W. 695;
Tarte v. Darby, 15 M. & W. 601.

(*r*) *Fish v. Campion*, 2 Ro. Ab. 498;
Carnarvon (Lord) v. Villebois, 13 M. & W.
at p. 342, per Alderson, B.

(*s*) *Shep. Touch.* 302; *Easton v. Penny*,
67 L. T. 290.

(*t*) *Davison v. Stanley*, 4 Burr. 2210.

(*u*) *Zouch v. Parsons*, 3 Burr. at p.
1807.

(*v*) *Bac. Ab. Leases* (S. 2, 1).

(*x*) *Easton v. Penny*, *supra*.

(*y*) See two next-cited cases, dissent-
ing (on this point) from *Doe v. Forwood*,
3 Q. B. 627.

(*z*) *Doe v. Poole*, 11 Q. B. 713, per
Erle, J.

(*a*) *Doe v. Poole*, *supra*.

(*b*) *Doe v. Courtenay*, 11 Q. B. 702.

(*c*) *Roe v. Archbishop of York*, 6 East,
86.

follows that the lessee retains an interest in the old lease and will consequently be entitled to its custody (*d*).

In another view the intention of the parties in granting and accepting a new interest in the premises is quite immaterial; for whenever the lessee has been party to any act the validity of which he is estopped from disputing, and which cannot be effected whilst his estate continues, a surrender will be presumed by operation of law (*e*). Thus the acceptance by a lessee of an interest in the premises which, being of the same nature as his own, cannot stand with the lease, *e.g.*, the grant of a rent issuing out of the demised land (*f*), or of a mere servant's interest (*g*) in the premises in lieu of his own (*h*), will operate as a surrender. So where the lessee re-demises to his lessor for the whole term granted to him, with a reservation either of a rent (*i*), or of a sum in gross by way of rent (*k*), his former interest is likewise surrendered (*l*). And the same holds good where the conveyance by the lessee to the lessor is a valid assignment of his interest (*m*), even though such assignment is only by way of mortgage (*n*).

The acceptance of the new interest, in order to work a surrender, must in all cases be by the lessee himself. Thus the grant, with the oral assent of the tenant, of a new lease to a third party will not, in the absence of a change of possession (*o*), work a surrender of the former interest (*p*). So where, upon a lessee giving up his lease to be cancelled (an act by which his interest was not determined (*q*)), a new lease was granted to a third person, it was held that there had been no surrender in law (*r*). And, on the other hand, for a surrender to result it is necessary that the lessor or his successor in title should be a party to the new lease (*s*).

(2.) **By relinquishment of possession.**—Subject to the observations which follow, a surrender by operation of law may take place by the tenant relinquishing the possession of the demised premises.

(*d*) *Knight v. Williams*, [1901] 1 Ch. 256. Cf. *post*, p. 687.

(*e*) *Lyon v. Reed*, 13 M. & W. at p. 306, per Parko, B.

(*f*) *Bac. Ab. Leases* (S. 2, 3).

(*g*) As to the legal incidents of which see *ante*, p. 6.

(*h*) *Peter v. Kendal*, 6 B. & C. 703; *Lambert v. McDonnell*, 15 Ir. C. L. Rep. 136.

(*i*) *Lloyd v. Langford*, 2 Mod. 174.

(*k*) *Smith v. Mapleback*, 1 T. R. 441.

(*l*) *Bac. Ab. Leases* (S. 1, 1).

(*m*) See *Doe v. Ridout*, 5 Taunt. 519. This might also be regarded as an express surrender: cf. p. 630, *supra*.

(*n*) *Cottee v. Richardson*, 7 Exch. 143.

(*o*) See under next head.

(*p*) *Wallis v. Hands*, [1893] 2 Ch. 75.

(*q*) *Supra*, p. 630.

(*r*) *Wootley v. Gregory*, 2 Y. & J. 536. Cf. *infra*, p. 641.

(*s*) *Easton v. Penny*, 67 L. T. 290.

(a) *As between landlord and tenant only.*—Mere relinquishment of possession by the tenant—*e.g.*, upon a parol agreement with the landlord to determine the tenancy (*t*), or upon a parol licence from him to quit (*u*), or upon a parol agreement with him to accept a third person as tenant in the tenant's place (*x*)—is not sufficient; there must be acceptance of the possession by the landlord. *Primâ facie* a surrender which is founded on express agreement is within the Statute of Frauds, and must therefore be in writing (*y*); but the acceptance of possession takes the case out of the statute in a manner analogous to "part performance" in the case of a grant (*z*). The question whether there has been such acceptance or not is one of fact (*a*). Acts of ownership exercised by the landlord over the premises after the tenant has quitted them are evidence from which it may be inferred (*b*). But mere occupation of them not for purposes of profit, *e.g.*, putting in a caretaker (*c*), entering to do repairs (*d*), or to keep the premises otherwise in a proper condition (*e*), even temporarily occupying a small portion of them by servants or workmen (*f*) (but not by way of taking possession (*g*)), will not be sufficient. And though an actual reletting of the premises will undoubtedly operate as an acceptance (*h*) if the new tenant be let into possession (*i*)—unless the landlord give notice to the tenant that he is reletting solely on the latter's account (*k*),—mere endeavours to let on the part of the landlord, as by putting up bills in the window, will not have that effect (*l*).

An agreement between the parties that on the tenant quitting immediately rent will be excused, followed by his giving up possession accordingly, operates (*m*), in the same way as a surrender, to free him from all liability for subsequent rent (*n*); and such an

(t) *Thomson v. Wilson*, 2 Stark. 379. If such an agreement be in writing, the surrender may be good as an express surrender within the Statute of Frauds: *supra*, p. 629.

(u) *Mollett v. Brayne*, 2 Camp. 103; *Whittaker v. Barker*, 1 Cr. & M. 113.

(x) *Taylor v. Chapman*, Peake, Add. Ca. 19.

(y) See *Johnstone v. Hudlestone*, 4 B. & C. 922.

(z) *Ante*, p. 363.

(a) *Reeve v. Bird*, 1 C. M. & B. 31.

(b) *Reeve v. Bird*, *supra*; *Phene v. Popplewell*, 12 C. B. N. S. 334.

(c) *Bird v. Defonvielle*, 2 C. & K. 415.

(d) *Bessell v. Landsberg*, 7 Q. B. 638; *Smith v. Blackmore*, 1 T. L. R. 267.

(e) *Griffith v. Hodges*, 1 C. & P. 419.

(f) *Oastler v. Henderson*, 2 Q. B. Div. 575.

(g) As in *Smith v. Roberts*, 9 T. L. R. 77.

(h) See pp. 640, 641, *infra*.

(i) *Doe v. Johnston*, M'Cl. & Y. 141.

(k) See *Walls v. Atcheson*, 3 Bing. 462.

(l) *Redpath v. Roberts*, 3 Esp. 225; *Oastler v. Henderson*, *supra*; *Smith v. Blackmore*, 1 T. L. R. 267; *Wilson v. Chisholm*, 4 C. & P. 474.

(m) *Gore v. Wright*, 8 A. & E. 118; *Smith v. Lovell*, 10 C. B. 6.

(n) *Whitehead v. Clifford*, 5 Taunt. 518; *Grimman v. Legge*, 8 B. & C. 324. As to rent payable in such cases, see pp. 123, 399, *ante*.

agreement may be implied from the whole transaction between the parties (*o*).

The acceptance by the landlord of the key of the premises is equivocal, and may be referred to either of two causes. He may accept it as the symbol of possession with the intention that the tenancy should be determined (*p*) (when a surrender takes place by operation of law),—and such intention may be inferred from his subsequent conduct (*q*); or he may accept it “because he cannot help himself” (*r*), as, for instance, where the tenant on delivering up the key deserts the premises (*s*) or leaves the country (*t*). The landlord may of course accept the key subject to any special agreement (*u*); but the fact that upon receiving it he expressly repudiates the intention of allowing the tenancy to be determined is not in itself conclusive that the former inference is not to be drawn (*x*). In the second class of cases there is no surrender, nor if a surrender subsequently take place, *e.g.*, by a reletting of the premises, does it relate back to the time of the delivery of the key (*t*). The question as to the character of the acceptance of the key, as in all similar cases, is one of fact (*y*), it being for the Court to rule whether there is any evidence of its acceptance sufficient for a surrender (*z*); and mere proof of delivery of the key at the reversioner’s office to a clerk, and of the fact that it was not returned to the tenant, has been held insufficient for this purpose (*a*). The delivery of the key may be made *by* an agent (*e.g.*, by the tenant’s wife), if duly authorized in that behalf (*b*); and so on the other hand it may be made *to* an agent (*e.g.*, to one of two joint lessors as agent for the other (*b*)), if he be so authorized, but not otherwise (*c*).

The relinquishment (either with (*d*) or without (*e*) an express agreement) of *part* of the demised premises by the tenant, coupled with the fact of acceptance of a diminished rent by the landlord, is evidence of the creation of a new tenancy between the parties,

(*o*) *Furnicall v. Grove*, 8 C. B. N. S. 496.

(*p*) *Whitehead v. Clifford*, *supra*; *Grimman v. Legge*, *supra*; *Phené v. Popplewell*, 12 C. B. N. S. 334.

(*q*) *Phené v. Popplewell*, *supra*; *Smith v. Roberts*, *infra*.

(*r*) *Oastler v. Henderson*, 2 Q. B. Div. 575, per Cockburn, C. J.; followed in *In re Panther Lead Co.*, [1896] 1 Ch. 978.

(*s*) *Smith v. Blackmore*, 1 T. L. R. 267.

(*t*) *Oastler v. Henderson*, *supra*.

(*u*) *Wilson v. Chisholm*, 4 C. & P. 474.

(*x*) *Smith v. Roberts*, 9 T. L. R. 77.

(*y*) *Oastler v. Henderson*, *supra*. See per Bramwell, L. J.

(*z*) See next-cited case.

(*a*) *Cannan v. Hartley*, 9 C. B. 634.

(*b*) *Dodd v. Aklom*, 6 M. & Gr. 672.

(*c*) *Cannan v. Hartley*, *supra*.

(*d*) *Holme v. Brunskill*, 3 Q. B. Div. 495.

(*e*) *Jones v. Bridgman*, 39 L. T. 500.

and consequently of a surrender by operation of law of the former (*f*). But such evidence is not conclusive (*g*), nor will it support that inference where the diminution in the land and rent—whether effected by the tenant himself (*g*), or by an assignee (*h*), who, it may be observed, is empowered to surrender by the very fact of the assignment (*h*)—is small and unimportant (*i*). Moreover, the mere fact of payment and acceptance of a diminished rent will not amount to a surrender, because it does not of itself imply a new demise (*k*); and the same holds good of an increased rent payable upon alterations or improvements (*l*). But in both cases such payment may be *evidence* of a surrender and new tenancy (*m*).

(*b*) *Upon entry of new tenant*.—If upon relinquishment of possession by the tenant a new tenant enters, the former tenancy—except where the reletting by the landlord is on the tenant's account, and the latter has notice to that effect (*n*)—will be determined by operation of law (*o*); though the landlord may expressly reserve his rights against his former tenant (*p*). This is for the same reason as in the case of a new letting to the same tenant (*q*), *i.e.*, because the lessor could have no power to create the new term if the original term still subsisted (*r*). The entry must be with the consent of the landlord (*s*) and of the former tenant (*t*). If there be several lessors the consent of all is necessary unless the one giving it is authorized to give it on behalf of the others (*u*); and if the reversion is vested at the time in another person, *e.g.*, a mortgagee, he also must be a party to the arrangement (*x*). But the consent of the landlord need not be given at the actual time of entry (*y*).

The consent on the part of the tenant need not be express; but

(*f*) *Jones v. Bridgman*, 39 L. T. 500. Cf. p. 634, *supra*.

(*g*) *Holme v. Brunskill*, *supra*.

(*h*) *Baynton v. Morgan*, 22 Q. B. Div. 74.

(*i*) *Holme v. Brunskill*, *supra*, per Brett, L. J.

(*k*) *Crowley v. Vitty*, 7 Exch. 319; *Clarke v. Moore*, 1 Jon. & L. 723.

(*l*) *Donellan v. Read*, 3 B. & Ad. 899; *Geekie v. Monk*, 1 C. & K. 307; *Doe v. Geekie*, 5 Q. B. 841; *Inchiquin (Lord) v. Lyons*, 20 L. R. (1.) 474.

(*m*) *Ex parte Vitale*, 47 L. T. 480 (increase); *Hodges v. Lawrence*, 18 J. P. 347 (decrease).

(*n*) See *Walls v. Atcheson*, 3 Bing. 462.

(*o*) See 2 Sm. L. C. pp. 837 *et seq.* (11th ed.), notes to *Doe v. Oliver*.

(*p*) *Dawson v. Lamb*, 3 C. & K. 269.

(*q*) *Supra*, p. 634.

(*r*) *McDonnell v. Pope*, 9 Hare, 705; *Nickells v. Atherstone*, 10 Q. B. 944.

(*s*) *Matthews v. Savell*, 8 Taunt. 270.

(*t*) *Doe v. Wood*, 14 M. & W. 682, per Parke, B.; *Nickells v. Atherstone*, *supra*.

(*u*) *Turner v. Hardey*, 9 M. & W. 770.

(*x*) *Cadle v. Moody*, 30 L. J. Ex. 385.

(*y*) *Thomas v. Cook*, 2 B. & A. 119; *Bees v. Williams*, 2 C. M. & R. 581 (mutual exchange by two occupiers of their holdings).

though cancellation of his lease cannot take effect as a surrender by operation of law (*z*), it may be evidence of such a surrender by showing this consent to have been given (*a*).

It makes no difference whether the new tenancy be created by deed (*b*), or merely by parol (*c*); or whether it be to a new lessee altogether (*d*), or to a person or persons who (or some of whom) may have been included in the former demise (*e*); or whether it be created at the same time as the former tenant gives up his possession (*f*), or afterwards (*g*); or whether the new tenant has entered under the former tenant (*h*), or directly under the landlord (*i*). But actual substitution of one tenant for the other, by the possession being transferred, is necessary in all cases (*k*); mere evidence of readiness on the part of the landlord to accept the new tenant is not sufficient (*l*). The question whether there has been acceptance or not of the new tenant is one of fact (*m*). The mere fact that rent has been paid, even on more than one occasion, by the cheque of a person other than the tenant is not of course in itself sufficient to show acceptance of such other person (*n*). Receipts, however, given in his name are evidence to that effect (*o*), but such evidence is not conclusive (*p*); and the same remark applies to the mere receipt of rent by the landlord from a third person in occupation of the premises (*q*). Where the landlord's acceptance had been obtained by fraudulently concealing from him the fact, which was known to the tenant, that the new tenant had made a composition with his creditors, and the new tenant who went into possession proved to be insolvent, it was held that the surrender was vitiated by such fraud, and that the former tenant was consequently still liable for the rent (*r*).

The above principle, which rests, as has been seen, on the fact

(*z*) *Doe v. Thomas*, 9 B. & C. 288.

(*a*) *Davison v. Gent*, 1 H. & N. 744;
Walker v. Richardson, 2 M. & W. 882.

(*b*) *Davison v. Gent*, *supra*; *Walker v. Richardson*, *supra*.

(*c*) *Thomas v. Cook*, *supra*.

(*d*) *Nickells v. Atherstone*, *supra*.

(*e*) *Hamerton v. Stead*, 3 B. & C. 478;
Graham v. Whichelo, 1 Cr. & M. 188.
As to a new letting to the tenant himself, see p. 634, *supra*.

(*f*) *Stone v. Whiting*, 2 Stark. 235.

(*g*) *Nickells v. Atherstone*, *supra*.

(*h*) *Thomas v. Cook*, *supra*.

(*i*) *Nickells v. Atherstone*, *supra*.

(*k*) *Wallis v. Hands*, [1893] 2 Ch. 75,

F.

cited *supra*, p. 637; *Tyler v. Hook*, 19 J. P. 326.

(*l*) *Graham v. Whichelo*, 1 Cr. & M. 188.

(*m*) *Woodcock v. Nuth*, 8 Bing. 170;
Thomas v. Cook, *supra*.

(*n*) See *Ewart v. Fryer*, 82 L. T. 415; *affd.*, [1901] 1 Ch. 499, and (H. L.) *Fryer v. Ewart*, [1902] A. C. 187 (reported as *Watney v. Ewart*, 86 L. T. 242).

(*o*) *Laurance v. Fauz*, 2 F. & F. 435.

(*p*) *Graham v. Whichelo*, *supra*.

(*q*) *Doe v. Wood*, 14 M. & W. 682;
Copeland v. Watts, 1 Stark. 95.

(*r*) *Bruce v. Ruler*, 2 M. & Ry. 3.

of change of possession, cannot apply to the case of reversions or other incorporeal hereditaments (*s*).

Effect of Surrender.

Although by a surrender the interest created by the lease is effectually destroyed, it does not put an end to liability for breaches of covenant which have already occurred (*t*). Nor does it operate to extinguish the rights of third persons not parties or privies thereto, who have acquired an interest under the lease before its surrender (*u*); for a lessee can only give title to his lessor by a surrender to the same extent that he could give it to another person by his assignment (*x*). Hence where the lessee underlets a portion of the demised premises, and afterwards surrenders his lease to the lessor, the latter cannot dispossess the underlessee without determining his interest in a regular manner (*y*); and it makes no difference that the underlessee has due notice of the surrender (*z*), nor is it material that the lease itself was at the time of surrender liable to forfeiture (*a*). *A fortiori*, when the lessee surrenders his lease for the express purpose of getting rid of a restrictive covenant contained in it, upon the faith of the existence of which (as represented by the lessee) the underlease had been taken, will the rights of the underlessee in respect of it be preserved (*b*).

So the rights of a purchaser or mortgagee of fixtures from the tenant are not affected by the surrender of the latter's interest (*c*), and this even though he may not have complied with an express stipulation to remove them within a specified time after the sale (*d*); for both he, and any person claiming under him, have (unlike the tenant himself (*e*)) a reasonable time in which to remove them after the determination of the lease by the surrender (*f*). But where the rights acquired by the third party are merely of an equitable nature (*e.g.*, to the tenant's growing crops under a bill of

(*s*) *Lyon v. Reed*, 13 M. & W. 285. See 2 Sm. L. C. 845.

(*t*) Cf. *ante*, p. 166.

(*u*) Co. Lit. 338 b; *Doe v. Pyke*, 5 M. & S. 146; *Williams v. Taperell*, 8 T. L. R. 241.

(*x*) *Walter v. Yalden*, [1902] 2 K. B. 304, per Channell, J.

(*y*) *Pleasant v. Benson*, 14 East, 234.

(*z*) *Mellor v. Watkins*, L. R. 9 Q. B. 400.

(*a*) Per Mellish, L. J., in *G. W. Ry.*

Co. v. Smith, 2 Oh. Div. 235; *affd.*, *Smith v. G. W. Ry. Co.*, 3 App. Ca. 165. See *post*, p. 653.

(*b*) *Piggott v. Stratton*, 1 D. F. & J. 33, explained in *Spicer v. Martin*, 14 App. Ca. 12.

(*c*) *London and Westminster Loan Co. v. Drake*, 6 C. B. N. S. 798.

(*d*) *Saint v. Pilley*, L. R. 10 Ex. 137.

(*e*) Cf. *post*, p. 708.

(*f*) *Moss v. James*, 38 L. T. 595.

sale), he can only exercise them, upon a surrender taking place, subject to the liability of such property to a distress by the landlord for the rent which would have accrued due had there been no surrender (*g*). And the general principle applies to third parties only, they having no control over the surrender; hence where in a lease there is a re-grant by the lessee of an easement for the benefit of the lessor, it would seem that such a right would not survive a surrender of the lease (*h*).

It has been held that after the surrender of a lease neither party can claim the benefit of any of its provisions expressed to take effect at (or within a given time after) the expiration "or other sooner determination" of the lease; because those provisions, together with every other term in the lease, are put an end to by the surrender (*i*).

Although, as has just been seen, an undertenant's *rights* are not disturbed by a surrender of the lessee's interest, his *liability* for rent, and upon his other covenants, was formerly by such act at an end, because the immediate reversion was destroyed (*k*). But this is no longer the case, since it has now been enacted that when a reversion expectant on a lease is surrendered, the estate which confers, as against the tenant, the next vested right to the tenements, shall be deemed the reversion for the purpose of preserving the incidents to and obligations on the reversion (*l*). And where a lease, under which interests by way of underlease have been created is duly surrendered in order to be renewed (*m*), another enactment (*n*) provides that the new lease shall be as valid for all purposes as if the underleases had been likewise surrendered at the time when it was granted.

The enactment in question is couched in the following words:—"In case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall, without a surrender of all or any the underleases, be as good and valid to all intents and purposes as if all the underleases derived thereout had been

(*g*) *Clements v. Matthews*, 11 Q. B. Div. 808. And subject also to the expense of distraining, as well as of cultivating and reaping the crops: *id.*

(*h*) *Dyneror (Lord) v. Tennant*, 13 App. Ca. 279, per Lord Herschell.

(*i*) *Ex parte Glegg*, 19 Ch. Div. 7 (reported as *Ex parte Gregg*, 51 L. J. Ch. 367); *Ex parte Dyke*, 22 Ch. Div. 410.

(*k*) *Webb v. Russell*, 3 T. R. 393. This case was more properly one of merger (see next chapter), but the same principle applies.

(*l*) 8 & 9 Vict. c. 106, s. 9; *Re Britton*, 61 L. T. 52.

(*m*) As to renewal, see p. 306, *atn.*

(*n*) 4 Geo. 2, c. 28, s. 6.

likewise surrendered at or before the taking of such new lease; and all and every person and persons in whom any estate for life or lives, or for years, shall from time to time be vested by virtue of such new lease, and his, her, and their executors and administrators shall be entitled to the rents, covenants, and duties, and have like remedy for recovery thereof; and the underlessees shall hold and enjoy the messuages, lands, and tenements in the respective underleases comprised as if the original leases, out of which the respective underleases are derived, had been still kept on foot and continued; and the chief landlord and landlords shall have and be entitled to such and the same remedy by distress or entry in and upon the messuages, lands, tenements, and hereditaments comprised in any such underlease for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such underlease was derived, as they would have had in case such former lease had been still continued, or as they would have had in case the respective underleases had been renewed under such new principal lease."

The effect of this statute, the object of which was to put all parties in the same situation as if no surrender had taken place (o), and which enables a tenant who has sub-let to surrender his lease notwithstanding any tenancies created under it, is to leave untouched those sub-interests in the premises, and to place the person to whom the new lease is granted in the position of an assignee of the reversion with regard to them (p). It does not, however, enable the head landlord to take proceedings, while the renewed term is still running, to recover possession as against an underlessee who holds over after the determination of his own interest (q). This, as will be seen hereafter (r), has an important bearing on the operation of the Statute of Limitations.

(o) *Doe v. Marchetti*, 1 B. & Ad. 715,
per Lord Tenterden, C. J.

(p) *Cousins v. Phillips*, 3 H. & C. 892,
per Channell, B.

(q) *Ecclesiastical Commissioners v. Tree-
mer*, [1893] 1 Ch. 166.

(r) *Post*, p. 688.

CHAPTER V.

M E R G E R.

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Nature.—A lease may be determined by merger.

A “merger” takes place where a tenant acquires the immediate reversion; for when a greater estate and a less coincide in the same person without any intermediate estate, the less is said to be merged in the greater (*a*). A term of years may merge in a reversionary term of less duration than itself (*b*). For merger, however, to take place the two interests must come to one and the same person in one and the same right (*c*). A term of years and a freehold may subsist in the same person without merger if held in different rights, and this whether the two estates coalesce by act of law or by act of the party: at all events (as regards the latter case) where the act of the party in whom they coalesce is not one of “active and immediate acquisition” (*d*). Where, for instance, a tenant for years makes the reversioner his executor (*e*), or where a person has a term of years in his own right, and the reversion in right of his wife (*f*)—even though he be tenant by the curtesy initiate (*g*) during her lifetime, by the fact of her having issue (*h*),—or where he has a term of years in his own right and the reversion in his right of administrator to another person (*i*),—there will be no merger. A tenant for years who purchases the reversion in fee may also prevent a merger by taking a conveyance to a trustee for himself (*k*).

(*a*) 2 Black. Comm. 177.

(*b*) *Stephens v. Bridges*, 6 Madd. 66.

(*c*) 2 Black. Comm. 177.

(*d*) *Jones v. Davies*, 5 H. & N. 766; affd., 7 H. & N. 507.

(*e*) 2 Black. Comm. 177.

(*f*) *Platt v. Sleep*, Cro. Jac. 275.

(*g*) Co. Lit. 30 a.

(*h*) *Jones v. Davies*, *supra*.

(*i*) *Chambers v. Kingham*, 10 Ch. D. 743.

(*k*) *Belaney v. Belaney*, L. R. 2 Ch. 138.

As already stated, there must be no intervening estate, however short, or there will be no merger (*l*). Hence, where a lessee sub-let for his whole term except a few days, and then conveyed to the lessor all his interest, but only for the term granted by the sub-lease, it was held that no merger had taken place (*m*). And there must be a union of two *estates*; hence the doctrine does not apply to the case of a lease commencing *in futuro*, because the lessee, who acquires thereby only an *interesse termini* (*n*), has a mere right and not an estate at all (*o*).

Sometimes it happens that the question of merger or no merger depends on the true construction of the lease. Where, for instance, a demise was made of a strip of land for the purpose of making a canal, and the lessees covenanted to allow to the lessors certain rights of way across the canal, it was held, that as the intention of the parties was that such rights should be enjoyed by the lessors as owners of the reversion and not as owners of the adjoining lands, upon the acquisition by the lessees of the reversion in the canal a merger took place by virtue of which those rights were extinguished (*p*).

It has now been provided by statute (*q*) that there shall not (*r*) be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity. This means that where there would not be a merger both at law and in equity, then the merger shall not follow because it would operate at law; but that where there would be a merger both at law and in equity, then the merger is to exist notwithstanding the provisions of the Act (*s*). This result may also be expressed by saying that if the circumstances are such that a Court of equity would formerly have held that there was no merger in equity, there is now no merger at law, and the rights of the parties must be dealt with on that footing (*t*). In deciding whether there is a merger in equity—and this applies to the merger of estates as well as to the merger of charges (*u*)—what must be

(*l*) *Supra*, p. 645.

(*m*) *Burton v. Barclay*, 7 Bing. 745.

(*n*) *Ante*, p. 20.

(*o*) *Doe v. Walker*, 5 B. & C. 111 (explaining *Salmon v. Swann*, Cro. Jac. 619); *Hyde v. Warden*, 3 Ex. Div. 72.

(*p*) *Dynevor (Lord) v. Tennant*, 13 App. Ca. 279.

(*q*) Jud. Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 4.

(*r*) After the commencement of the Act (1st November, 1875: 38 & 39 Vict. c. 77, s. 2).

(*s*) Per Kekewich, J., *Snow v. Boycott*, [1892] 3 Ch. 110.

(*t*) *Capital & Counties Bank v. Rhodes*, [1903] 1 Ch. 631, per Cozens-Hardy, L. J.

(*u*) *Capital & Counties Bank v. Rhodes*, *supra*.

first looked at is the intention of the parties (*x*); and if that be not expressed, then the Court looks to the benefit of the person in whom the interests coalesce (*y*). Hence, where a tenant for life in remainder of settled property takes a beneficial lease (or an agreement for a lease) of a portion thereof, and subsequently becomes tenant for life in possession, there is no merger (*z*). Moreover, a mere agreement for a lease, specifically enforceable in equity, cannot as it seems in any case be merged by reason only of the person entitled to the lease happening subsequently to fill the position of lessor (*a*).

In conformity with the above principles, where a lessee for years, who had mortgaged his term by sub-demise, afterwards purchased the fee simple "subject to but with the benefit of" the lease, immediately (and as part of the same transaction) making a mortgage of the property to a bank (as to that part of it which was freehold in fee, and as to that which was leasehold for the residue of the term except the last day thereof), it was held—having regard to the circumstance that the lessee could not have purchased the reversion without the co-operation of the bank, and that it was an essential condition of such co-operation (as sufficiently appeared from the documents) that the term should be kept alive so that the security of the rent reserved by the lease should be offered to the bank,—that there was no merger, and that in default of payment of the rent reserved by the lease the clause of re-entry therein contained could be enforced by the bank against the mortgagees of the lease, who had taken possession under their mortgage (*b*).

Operation.—As in the case of a surrender (*c*), the law formerly was, that where a lessee who had sub-let assigned his reversion to a person who afterwards took a conveyance of the fee, so that his former interest was merged, the sub-lessee's liability in respect

(*x*) See *Theellusson v. Liddard*, [1900] 2 Ch. 635. To ascertain this intention regard may be had to dealings with the property subsequent to the coalescence: *Lea v. Thursby*, [1904] 2 Ch. 57.

(*y*) Per Farwell, J., in next-cited case.

(*z*) *Ingle v. Vaughan-Jenkins*, [1900] 2 Ch. 368.

(*a*) *Id.*, per Farwell, J.

(*b*) *Capital & Counties Bank v. Rhodes*, [1903] 1 Ch. 631. No rent, of course, was

reserved in the sub-demise, and the result of a merger would have been that the mortgagees of the lease would, by force of the statute next referred to, have held directly under the owners in fee without any obligation to pay rent at all. The liability of the lessee, who had covenanted in the usual way to indemnify his mortgagees against payment of the rent, was held further not to be enforceable against the bank, although the bank claimed under him.

(*c*) *Ante*, p. 643.

of his covenants ceased by the destruction of the immediate reversion (*d*).

This, however, no longer holds good, for it has been enacted that when a reversion expectant on a lease is merged, the estate which confers, as against the tenant, the next vested right to the tenements shall be deemed the reversion for the purpose of preserving the incidents to and obligations on the reversion (*e*).

It may be added here that though a lease may be merged at law, restrictive covenants by the lessee contained in it may as against him still be kept alive in equity, *e.g.*, where they are to his knowledge entered into for the benefit of adjoining owners (*f*) of plots into which land has been divided under a building scheme (*g*).

(*d*) *Webb v. Russell*, 8 T. R. 398.

(*e*) 8 & 9 Vict. c. 106, s. 9; *Craig v. Greer*, [1899] 1 I. R. 258.

(*f*) See *ante*, pp. 260—263.

(*g*) *Birmingham Joint Stock Co. v. Lea*, 36 L. T. 843.

CHAPTER VI.

FORFEITURE.

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How arising.—A tenancy may determine by forfeiture :—either by express stipulation between the parties, or by act of law. The loss of the tenant's interest by breach of a condition, or by operation of the proviso for re-entry on breach of a covenant (*i.e.*, by express stipulation), has already been considered (*a*). In addition to this, if he set up a title hostile to that of his landlord (*b*), or even merely assist another person to do so, he likewise incurs forfeiture (by act of law) (*c*), as if he deliver up possession of the premises and lease to another person, with the intention of enabling him, not to hold under the lease, but to set up such a title (*d*). And a similar result was—before the tortious operation of feoffments was removed (*e*)—held to ensue where a tenant for years alienated his estate in fee (*f*). But to incur a forfeiture of this kind he must do some act in itself unequivocal (*g*), and one the effect of which is to place his landlord in a worse condition (*h*). Setting up a claim, for instance, *verbally* to be owner of the premises in fee (*i*), or claiming to be owner under an agreement of purchase (as there is no absolute abandonment of the relation of landlord and tenant) (*k*), or paying the rent reserved by a lease to a third person (*l*), will not be sufficient.

(a) *Ante*, pp. 316 *et seq.*
 (b) As to the effect of disclaimer in periodic tenancies, see p. 598, *ante*.
 (c) *Doe v. Flynn*, 1 C. M. & R. 137, per Lord Lyndhurst, C. B.
 (d) *Doe v. Flynn*, *supra*.
 (e) By 8 & 9 Vict. c. 106, s. 4.

(f) *Read v. Erington*, Cro. Eliz. 321.
 (g) *Ackland v. Lutley*, 9 A. & E. 879.
 (h) *Doe v. Wells*, 10 A. & E. 427, per Lord Denman, C. J.
 (i) *Doe v. Wells*, *supra*.
 (k) *Rees v. King*, Forr. 19.
 (l) *Doe v. Parker*, Gow, 180.

Where an allotment is let by a district or parish council under the provisions of the Allotments Act, 1887 (*m*), provision is specially made by the Act for the determination of the tenancy by forfeiture. For it directs (*n*) that "if the rent for any allotment is in arrear for not less than forty days, or if it appears" to the council "that the tenant of an allotment, not less than three months after the commencement of the tenancy thereof, has not duly observed the regulations affecting such allotment made by or in pursuance of this Act, or is resident more than one mile out of the district or parish for which the allotments are provided," the council "may serve upon the tenant, or, if he is residing out of the district or parish, leave at his last known place of abode in the district or parish, or fix in some conspicuous manner on the allotment, a written notice determining the tenancy at the expiration of one month after the notice has been so served or affixed, and thereupon such tenancy shall be determined accordingly" (*o*).

The law relating to forfeiture in the particular case of non-payment of rent will be discussed separately at the end of this chapter.

Its effect.—When a lessor re-enters for a condition broken, the same estate becomes re-vested in him as was vested in him at the time he granted the lease (*p*), and he may avoid all mesne charges and incumbrances (*q*); so that upon a forfeiture accruing a sub-lessee or other person who claims under the lessee loses his estate as well as the lessee himself (*r*). On the other hand, re-entry does not put an end to the lessee's liability to damages for anterior breaches of covenant, even if by the terms of the tenancy it re-vest the estate in the lessor as if the lease had never been made (*s*). In the case, too, where rent is made payable in advance, it would seem that the landlord is entitled to retain the whole of it when it has been paid, even though he has enforced a forfeiture during the period in respect of which the payment is made (*t*). Where a building agreement provided by one of its clauses that, on default by the lessee in completing within the stipulated time, the whole

(*m*) 50 & 51 Vict. c. 48. See *ante*, p. 54.

(*n*) Sect. 8 (2).

(*o*) As to forfeiture in tenancies of "small holdings," see 55 & 56 Vict. c. 31, s. 9 (7): referred to *ante*, p. 56.

(*p*) Co. Lit. 202 a.

(*q*) Bac. Ab. Conditions (O. 4).

(*r*) *G. W. Ry. Co. v. Smith*, 2 Ch. Div. at p. 253, per Mellish, L. J.; (*affd.*, *Smith*

v. G. W. Ry. Co., 3 App. Ca. 165); *Ewart v. Fryer*, [1901] 1 Ch. 499; *affd.*, *Fryer v. Ewart*, [1902] A. C. 187 (reported as *Watney v. Ewart*, 86 L. T. 242).

(*s*) *Hartshorne v. Watson*, 4 Bing. N. C. 178.

(*t*) *Ellis v. Rowbotham*, [1900] 1 Q. B. 740, per Romer, L. J.: cited *ante*, p. 124; *National Telephone Co. v. Griffen*, [1906] 2 I. R. 115.

benefit of the agreement, and all the materials and buildings on the premises, should be forfeited to the lessor, and by another clause that the lessor should be entitled to re-enter and take possession of the premises, with all buildings and materials thereon, without making to the lessee any compensation in respect thereof, it was held, upon such default being made, re-entry having taken place accordingly, that the lessor was not restricted to that remedy, but that an action of damages—to be measured by the actual pecuniary loss sustained—was also maintainable by him for breach of the agreement (*u*).

Waiver.—It has already been pointed out (*x*) that upon a forfeiture occurring (whether the proviso make the lease wholly void or merely give the landlord power to re-enter), it is entirely at the landlord's option whether he will avail himself of it or not. He may consequently pursue one of three courses:—affirm the lease, avoid it, or abstain from any act at all (*y*). If he pursue the first of these courses he is said to “waive” the forfeiture. Any actual waiver, however, by the lessor of the benefit of any covenant or condition in a lease does not extend to any breach other than that to which such waiver specially relates, unless an intention to the contrary should appear (*z*). Where a waiver takes place “at the request of the lessee,” and is in writing under the hand of the lessor, the latter is now “entitled to recover as a debt due to him” from the former, “and in addition to damages, if any, all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor, or valuer, or otherwise,” in reference to the breach giving rise to the forfeiture (*a*). This enactment, it will be observed, does not in terms provide that the lessee's “request” for waiver (which need not be in writing) must be express; but it is thought that this is necessary, and that a mere act on his part like payment of rent (which, as will be presently seen, may be the first step in a waiver), followed by acquiescence of the lessor with a written intimation that he waives the forfeiture, would not be sufficient.

(1) Any act by which the lessor shows that, after the act of the lessee upon which forfeiture accrues has come to his knowledge (*b*),

(*u*) *Marshall v. Mackintosh*, 78 L. T. 750.

(*x*) *Ante*, p. 322.

(*y*) See per Bramwell, B., in *Croft v. Lumley*, 6 H. L. C. at p. 705.

(*s*) 23 & 24 Vict. c. 38, s. 6.

(*a*) 55 & 56 Vict. c. 13, s. 2, sub-s. (1). Cf. *infra*, p. 662.

(*b*) *Harvey v. Oswald*, Cro. Eliz. 553,

he recognises the tenancy as still subsisting, amounts to a waiver; or, more properly, is evidence from which as a conclusion of fact the intention to waive the forfeiture may be inferred (*c*). Such evidence may therefore be rebutted, *e.g.*, by showing that a distress, which *primâ facie* operates as a clear waiver (*d*), was levied in order to complete a title to enforce a forfeiture given by statute (*e*). And it need scarcely be said that means of knowledge is not equivalent to actual knowledge within the above rule; so that where the act of forfeiture relied on was the winding-up of a company, neither the fact that it was duly advertised both in the *London Gazette* and largely in other ways, nor that it was a step legally necessary for the happening of an event of some public notoriety, was held to be sufficient (*f*).

Thus, where a landlord declares to the tenant that he will not enforce the forfeiture (*g*) (and a statement in a pleading which in effect recognises the tenancy as subsisting may be relied upon for that purpose (*h*)); gives him a receipt for bygone rent, in which he describes him as tenant (*i*); undertakes to grant him from the expiration of the lease a new lease (*k*); calls on him as tenant to do repairs (*l*); accepts rent due after the forfeiture—acceptance of rent due before is not sufficient (*m*)—from the lessee (*n*), or from some other person on his behalf and with his assent (*o*), or from his successor in interest under the lease (*p*) (and this notwithstanding a protest by the lessor that such acceptance is without prejudice to his right to insist upon the forfeiture (*q*)); sues him for rent due after the forfeiture (*r*); makes an unqualified demand upon him for such rent (*s*); distrains for rent (*t*), whether such rent be

572; *Pennant's case*, 3 Co. 64 a; *Roe v. Harrison*, 2 T. R. 425.

(*c*) *Doe v. Batten*, Cowp. 243; *Evans v. Wyatt*, 43 L. T. 176.

(*d*) *Infra*, at note (*t*).

(*e*) *Brewer v. Eaton*, 3 Doug. 230; *Thomas v. Lulham*, [1895] 2 Q. B. 400. See p. 671, *infra*.

(*f*) *Ewart v. Fryer*, 82 L. T. 415; *affd.*, [1901] 1 Ch. 499, and (H. L.) *Fryer v. Ewart*, [1902] A. C. 187 (reported as *Watney v. Ewart*, 86 L. T. 242).

(*g*) See *Ward v. Day*, 5 B. & S. 359.

(*h*) *Evans v. Davis*, 10 Ch. D. 747.

(*i*) *Green's case*, Cro. Eliz. 3.

(*k*) *Ward v. Day*, *supra*; *Doe v. Curwood*, 1 Har. & W. 140.

(*l*) *Griffin v. Tomkins*, 42 L. T. 359, per Cockburn, C. J.

(*m*) *Price v. Worwood*, 4 H. & N. 512.

(*n*) *Marsh v. Curteys*, Cro. Eliz. 528; *Goodright v. Davids*, Cowp. 803; *Doe v. Rees*, 4 Bing. N. C. 384; *Miles v. Tobin*, 17 L. T. 432; *Bridges v. Longman*, 24 Beav. 27; *Pierson v. Harvey*, 1 T. L. R. 430. Cp. *Keith v. National Telephone Co.*, [1894] 2 Ch. 147.

(*o*) *Pellatt v. Boosey*, 31 L. J. C. P. 281.

(*p*) *Doe v. Pritchard*, 5 B. & Ad. 765; *Whitchot v. Fox*, Cro. Jac. 398.

(*q*) *Davenport v. R.*, 3 App. Ca. 115; *Croft v. Lumley*, 6 H. L. C. 672; *Griffin v. Tomkins*, *supra*, per Lush, J.; *Strong v. Stringer*, 61 L. T. 470.

(*r*) *Dendy v. Nicholl*, 4 C. B. N. S. 376; *Roe v. Minshall*, Bull. N. P. 96.

(*s*) *Doe v. Birch*, 1 M. & W. 402, per Parke, B.; *Croft v. Lumley*, 6 H. L. C. at p. 705, per Bramwell, B.

(*t*) *Cotesworth v. Spokes*, 10 C. B. N. S. 103.

due before or after the forfeiture (*u*) (though a mere continuance in possession after forfeiture under a distress before forfeiture is not sufficient (*x*)),—in all these cases the forfeiture is waived. So an eviction (*y*) of the tenant, even if only constructive, may be regarded as a waiver by the landlord of his right to enforce a forfeiture (*z*). And where in a building agreement the ground of forfeiture is non-completion by an appointed day, advances of money made by the landlord for the purposes of the agreement will, as it seems, have the same effect (*a*). If the acceptance of rent be by an agent, and the lessor be not shown to have allowed it with knowledge of the act of forfeiture, the agent must have authority not merely to receive the rent but to grant a new lease, or the waiver will not be binding upon the principal (*b*). It has also been said that the acceptance by the landlord of a surrender amounts to a waiver of any right of forfeiture (*c*).

Where however the breach is of a *continuing* nature,—*e.g.*, in the case of a covenant to repair (*d*), or to insure (*e*), or to cultivate (*f*), or to use the premises only in a particular manner (*g*),—any of the foregoing acts will waive the forfeiture only down to the time at which it affirms the tenancy to exist: *i.e.*, in the case of accepting rent down to the time at which the rent falls due (*h*), and in that of a distress down to the time at which it is made (*i*). For a distress can only be made while the tenancy lasts, the statute 8 Anne, c. 14, ss. 6 and 7, not applying in the case of a forfeiture (*k*).

(*u*) See *infra*, at notes (*i*) and (*k*).

(*x*) *Doe v. Johnson*, 1 Stark. 411.

(*y*) See *ante*, pp. 166 *et seq.*

(*z*) *Pellatt v. Boosey*, 31 L. J. C. P. 281.

(*a*) *Ex parte Newitt*, 16 Ch. Div. 522, disapproving *Doe v. Brindley*, 12 Moore, 37. The point was not actually decided.

(*b*) *Doe v. Birch*, 1 M. & W. 402, per Parke, B.

(*c*) Per Mellish, L. J., in *G. W. Ry. Co. v. Smith*, 2 Ch. Div. at p. 253. This result (which might be of importance where an underlease has been created: see *ante*, p. 642), would, however, appear to be better capable of justification on the ground that the surrender having put an end to the lease there was nothing against which forfeiture could be enforced. As a matter of mere waiver want of knowledge of the acts upon which the forfeiture had been incurred would appear to create some difficulty: see *supra*.

(*d*) *Doe v. Jones*, 5 Exch. 498; *Doe v. Durnford*, 2 C. & J. 667, per Bayley, B.; *Coward v. Gregory*, L. R. 2 C. P. 153.

(*e*) *Doe v. Gladwin*, 6 Q. B. 953; *Price v. Worwood*, 4 H. & N. 512.

(*f*) *Coatsworth v. Johnson*, 54 L. T. 520, per Huddleston, B.

(*g*) *Doe v. Woodbridge*, 9 B. & C. 376.

(*h*) *Doe v. Gladwin*, *supra*.

(*i*) *Doe v. Peck*, 1 B. & Ad. 428; *Doe v. Durnford*, 2 C. & J. 667, per Bayley, B.; *Price v. Worwood*, 4 H. & N. 512, per Pollock, C. B.; *Ward v. Day*, 4 B. & S. 337, per Crompton, J.; *affd.*, 5 B. & S. 359. There is, however, a *dictum* in *Cotesworth v. Spokes*, 10 C. B. N. S. 103, which seems at variance with the statement in the text, but it appears to have been disapproved of: *Thomas v. Lulham*, [1895] 2 Q. B. 400.

(*k*) *Kirkland v. Briancourt*, 6 T. L. R. 441. See p. 514, *ante*.

With reference to the above rule it may be pointed out that no covenant, as it has been held, can be a "continuing" covenant which stipulates for the complete performance of a defined act within a named period (*l*), and that consequently a covenant to build, for instance, within a specified time is not such a covenant (*m*).

But where the necessary effect of a breach in itself continuous is to put it out of the lessee's power to end it, *e.g.*, where the covenant is against underletting or permitting another person to occupy, and the landlord accepts or distrains for rent with knowledge of an underletting for a definite period (*n*); or where the covenant being against permitting a trade to be carried on he accepts rent, with knowledge that trade is being carried on by a sub-tenant under circumstances which show that the sub-letting would, in the natural course of events, extend beyond the time in respect of which such rent is payable (*o*),—the breach does not prevent the act of the landlord from being a complete waiver during the whole time the sub-interest lasts (*p*), though not afterwards (*q*). For the acceptance of rent under such circumstances not merely amounts to a waiver of the past breach, but to a licence to continue the breach in future (*r*).

A few observations are added on waiver with special reference to the *covenant to repair*, inasmuch as the question arises perhaps most frequently upon that covenant. As already stated (*s*), its breach is of a continuing nature. Where the lease contains a general covenant to repair and a further covenant to repair after a notice of specified length, with a proviso for re-entry on breach of any covenant, the two covenants being independent (*t*), no notice, in order that the lessor may avail himself of the forfeiture under the general covenant, need be given at all (*u*); and if notice be given to repair "forthwith" (*x*), or "in accordance with the covenants of the lease" (*y*), or "to repair" generally (*z*), such forfeiture is not waived. But if the notice be to repair *within the time mentioned in*

(*l*) *Morris v. Kennedy*, [1896] 2 I. R. 247 (C. A.).

(*m*) *Jacob v. Down*, [1900] 2 Ch. 156.

(*n*) *Walrond v. Hawkins*, L. R. 10 C. P. 342 (reported as *Waldron v. Hawkins*, 32 L. T. 119).

(*o*) *Griffin v. Tomkins*, 42 L. T. 359; *Laurie v. Lees*, 14 Ch. Div. 249; *affd.*, 7 App. Ca. 19.

(*p*) See the three last-cited cases.

(*q*) *Doe v. Bliss*, 4 Taunt. 735.

(*r*) *Griffin v. Tomkins*, *supra*, per Cockburn, C. J.

(*s*) *Supra*, p. 653.

(*t*) *Ante*, p. 217.

(*u*) *Baylis v. Le Gros*, 4 C. B. N. S. 537. But now it is required under the Conv. Act: *infra*, p. 657.

(*x*) *Roe v. Patne*, 2 Camp. 520.

(*y*) *Few v. Perkins*, L. R. 2 Ex. 92.

(*z*) *Id.*, per Kelly, C. B.

the special covenant it is otherwise (*a*), for this is equivalent to an admission that the tenancy will continue up to that time (*b*); though a second notice under the general covenant may be validly given to satisfy the Conveyancing Act (*c*) during the currency of the first, where no attempt has been made to comply with it (*d*).

The same result follows where notice is given, under a power in the lease to that effect, to repair within a time specified, with an intimation added therein that in case of failure by the lessee the lessor will himself repair and distrain for the expense (*e*). Where the lease contains a general covenant to repair and a proviso for re-entry on non-repair after a notice of specified length, acceptance of rent which falls due while the notice is running (*f*), or even (as it has been held) after its expiration, if the premises remain subsequently out of repair (*g*), will not amount to a waiver, because such acceptance, as already explained (*h*), only affirms the tenancy at the time the rent accrues due. So the acceptance, after the expiration of a notice to repair given under the Conveyancing Act (*i*), of rent due while that notice was running is no waiver if there be non-repair afterwards (*k*). Nor, in an action of ejectment for non-repair, does a demand of rent (*as rent*) falling due even after such notice has expired operate as a waiver if there be subsequent non-repair (*l*). And a subsequent extension of time specified in a notice does not waive the original forfeiture, for such an extension is merely for the benefit of the tenant (*m*).

(2) Where the lessor does nothing, he does not disable himself from afterwards taking advantage of the forfeiture, for merely lying by and witnessing the breach or breaches upon which it accrues is not sufficient (*n*); nor will relief in such a case be given on equitable grounds (*o*). It has been held that some positive act is necessary on the part of the landlord, even though, in committing

(*a*) *Doe v. Meuz*, 4 B. & C. 606.

(*b*) *Id.*, per Holroyd, J.

(*c*) See p. 657, *infra*.

(*d*) *Cove v. Smith*, 2 T. L. R. 778.

(*e*) *Doe v. Lewis*, 5 A. & E. 277.

(*f*) *Doe v. Brindley*, 4 B. & Ad. 84.

(*g*) See *Fryett v. Jeffreys*, 1 Esp. 393, per Lord Kenyon, C. J. The jury, however, in this case found for the tenant, and the Court afterwards refused to disturb the verdict, possibly on the ground that as the right of re-entry was (apparently) confined to a breach of the covenant to repair *after notice*, a fresh notice, by receipt of the subsequently accruing rent, became necessary. See

the observations of Parke, J., in the case cited in the last note, as reported 1 Nev. & Man. 1.

(*h*) *Supra*, p. 653.

(*i*) *Infra*, p. 657.

(*k*) *Cronin v. Rogers*, C. & E. 348, Denman, J.

(*l*) *Penton v. Barnett*, [1898] 1 Q. B. 276.

(*m*) *Doe v. Brindley*, *supra*.

(*n*) *Doe v. Allen*, 3 Taunt. 78; *Ward v. Day*, 5 B. & S. 359, per Williams, J.

(*o*) *Bracebridge v. Buckley*, 2 Price, 200. Cp. *Hills v. Rowland*, 4 D. M. & G. 430.

the breaches, the tenant expend money on the premises with his knowledge (*p*).

(3) If the lessor elect to avoid the lease by bringing ejectment, the foregoing principles no longer apply; for by issuing and serving the writ he has chosen to put an end to the tenancy, and his determination is irrevocable (*q*). Hence, once that step has been taken, neither accepting rent (*r*), nor distraining for it (*s*), nor setting up by a pleading a subsequent breach of covenant, though inconsistent with the former, as an additional ground of forfeiture (*t*), will operate as a waiver. Similarly where the right of re-entry has accrued upon the bankruptcy of the lessee, the annulment of the bankruptcy subsequently to the issue of the writ in ejectment will not, as it seems, defeat it (*u*). But if the writ besides asking for possession claims a remedy (*e.g.*, an injunction restraining the breach upon which forfeiture has accrued) which is inconsistent with it, this principle does not apply, and *à fortiori* where the lessor, by his pleading also, treats the tenancy as subsisting (*x*). It appears even to have been held that forfeiture was waived where a writ in ejectment, issued in consequence of non-compliance with a notice to repair under the Conveyancing Act (*y*), claimed arrears of rent accruing after the notice was served, though the claim for such arrears was not repeated in the statement of claim (*z*). And though the action of ejectment shows an irrevocable intention on the part of the landlord to treat the tenant as a trespasser, payment and acceptance of rent due after the issue of the writ, though it will not set up the former tenancy, is on the general principle already explained (*a*) evidence of the existence of a new yearly tenancy on the same terms (*b*).

(*p*) *Perry v. Davis*, 3 C. B. N. S. 769. But such expenditure might now, it is thought, in a proper case, be a ground for invoking the equitable jurisdiction of the Court: cf. *ante*, p. 264; and see *Hume v. Kent*, 1 Ball & B. 554; *North Staffordshire Steel, &c., Co. v. Camoys*, 11 Jur. N. S. 555.

(*q*) *Serjeant v. Nash*, [1903] 2 K. B. 304, where it was held that such election was conclusive, not only as against the lessor himself, but as against third parties. See also *ante*, p. 322.

(*r*) *Doe v. Meux*, 1 C. & P. 346; *Jones v. Carter*, 15 M. & W. 718.

(*s*) *Grimwood v. Moss*, L. R. 7 C. P. 360.

(*t*) *Toleman v. Portbury*, L. R. 6 Q. B. 245; 7 Q. B. 344 (Ex. Ch.).

(*u*) *Smith v. Gronow*, [1891] 2 Q. B. 394. The point was not actually decided.

(*x*) *Evans v. Davis*, 10 Ch. D. 747.

(*y*) *Infra*, p. 658.

(*z*) *Began v. Barnett*, 13 T. L. R. 310. This decision seems to have been left standing in *Penton v. Barnett*, *supra*; but if its tenor be correctly given in the text—the report is a very meagre one—it is thought that (owing to disregard of the continuing character of the breach) it is really in conflict with the principles laid down by the C. A. in the later case, and that it may therefore be regarded as virtually overruled.

(*a*) *Ante*, p. 395.

(*b*) *Evans v. Wyatt*, 43 L. T. 176.

Relief.—The landlord's power, under the circumstances already mentioned, to enforce a forfeiture has, however, been considerably modified by the Conveyancing Acts (44 & 45 Vict. c. 41, as amended by 55 & 56 Vict. c. 13); and even apart from those enactments courts of common law had by statute, and courts of equity had by virtue of their inherent jurisdiction as well as by statute, been enabled to afford relief, in the cases and under the conditions to be presently mentioned, to the tenant. Such right of relief is a chose in action which vests, upon the tenant's bankruptcy, in his trustee, and the latter is entitled to sell such right and to assign it to the purchaser (*c*).

The Conveyancing Act, 1881, sect. 14, which applies to leases made either before or after the Act, takes effect notwithstanding any stipulation to the contrary (*d*): a lease limited to continue as long only as the lessee abstains from committing a breach of covenant operating for the purposes of the section as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach (*e*). And it applies even though the proviso under which the forfeiture accrues is inserted in the lease in pursuance of the directions of an Act of Parliament (*f*). Moreover, it extends, as it has been held, to an action brought for a mere declaration of forfeiture, where actual forfeiture is not claimed (*g*). The section provides as follows:—

“A right of re-entry or forfeiture under any proviso or stipulation in a lease (*h*) for a breach of any covenant or condition in the lease shall not be enforceable (*i*) by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach.”

(*c*) *Howard v. Fanshawe*, [1895] 2 Ch. 581.

(*d*) Sub-s. (9).

(*e*) Sub-s. (5).

(*f*) Sub-s. (4).

(*g*) *Wilson v. Rosenthal*, 22 T. L. R. 233. The action here was brought to prevent the exercise of an option by the tenant to continue the tenancy for a further period after the end of the term.

(*h*) The word is not defined in the

F.

Act; but though sect. 14 contains no provision similar to sect. 18 (17) (*ante*, p. 62), it is thought, having regard to its obvious intention to benefit the tenant, that its scope is not confined to leases under seal, but applies to all actual lettings, as in ordinary yearly tenancies created by instruments under hand only. And now as to agreements for leases, see *infra*, p. 666.

(*i*) Sub-s. (1).

Such notice (*k*) must be in writing; it may be *addressed* to the lessee by that designation without his name, or generally to persons interested without any name, and will be sufficient notwithstanding that any person affected thereby be absent, under disability, unborn or unascertained; and it may be *served* by leaving it at the last known place of abode or business in the United Kingdom of the lessee or other person to be served, or by affixing or leaving it on the land or on any house or building comprised in the lease, or by posting it in a registered letter addressed to the lessee, or other person to be served, by name at such place of abode or business, if such letter be not returned through the post office undelivered. Where a lessee had made a declaration of trust, in pursuance of which the trustee had entered into possession of the premises demised, it was held that service of the notice on him as a person "interested" within the above provision was insufficient, and that the service should have been on the lessee himself (*l*). But a notice is sufficiently served on an assignee if addressed to the original lessee and all others whom it may concern, and served on the occupiers (*m*).

Notwithstanding that sub-section (1) explicitly provides that a notice must in any case require the lessee to make compensation for the breach—in consequence of which it has been held that a notice defective in this respect is wholly invalid (*n*)—it is now settled that (where the breach is capable of remedy) it is not necessary for the notice to demand compensation which is not required (*o*).

It must, however, be so specific as to enable the tenant to understand with reasonable certainty what it is that he is required to do, so that he may have an opportunity of remedying the defects before an action of forfeiture is brought against him (*p*). It has been said, by the Court of Appeal, that the notice ought to be such "as to give the tenant precise information of what is alleged against him and what is demanded from him" (*q*). Thus, where lessees had committed a breach both of a building and of a repairing

(*k*) Sect. 67. See a form of notice in Chitty's Forms, p. 616 (13th ed.).

(*l*) *Gentle v. Faulkner*, [1900] 2 Q. B. 267.

(*m*) *Oronin v. Rogers*, C. & E. 348, Denman, J.

(*n*) *North London, &c., Land Co. v. Jacques*, 49 L. T. 659; *Greenfield v. Hanson*, 2 T. L. R. 876.

(*o*) *Lock v. Pearce*, [1893] 2 Ch. 271.

Whether the result would be the same where the breach was one incapable of remedy seems (it is submitted) very doubtful, for it is difficult in that case to see what purpose the notice could serve at all.

(*p*) Per North, J., in *Fletcher v. Nokes*, *infra*.

(*q*) *Horsey Estate v. Steiger*, [1899] 2 Q. B. 79.

covenant (*r*), and the breach of the former had been waived by the lessors, it was held that a notice which referred only to that covenant and not to the repairing covenant was ineffectual (*s*). So where in the case of a lease of several houses a notice merely stated to the tenant that he had "broken the covenant for repairing the inside and outside of the houses" in question, without giving further details or indicating with regard to which of the houses default had been made, it was held insufficient (*t*). But a notice in the case of such a lease not specifying exactly what repairs were to be done in each house, but giving in detail a list of repairs to be done *if required* according to the condition of each house (thus leaving it to the tenant to ascertain in which of the houses and in which part of them the requirements should be carried out), has been held valid on the ground that the tenant on knowing what sort of work was required should do it where wanted, distinguishing the work which he was legally required to do from that which did not fall upon him according to law (*u*). On the other hand, a notice merely stating that the lessee of a house had not "kept the said premises well and sufficiently repaired and the party and other walls thereof" has been held bad as not sufficiently directing his attention to the particular breaches complained of (*x*).

If a notice is insufficient as to any one breach of covenant, the fact that it sufficiently specifies other breaches complained of will not (it has been so held) render it good (*y*). So where a notice containing a complaint as to a breach of covenant incapable of remedy contained also a complaint as to non-repair, with a schedule of the (somewhat extensive) repairs required, and contained a demand for compensation, and the notice was followed by the issue of a writ within two days (so that the lessors were admittedly not in a position to rely on forfeiture for non-repair), it was held that the lessees had been deprived by the claim in respect of non-repair of the opportunity of considering whether they had any

(*r*) See *ante*, p. 219.

(*s*) *Jacob v. Down*, [1900] 2 Ch. 156.

(*t*) *Fletcher v. Nokes*, [1897] 1 Ch. 271. In this case the statement of claim asked for damages for the breaches of covenant as well as recovery of possession, but the Court treated the action as substantially one of forfeiture and nothing else, and dismissed it with costs. In *In re Serle*, *infra*, however, this (rightly, it is thought) was not done.

(*u*) *Matthews v. Usher*, 68 L. J. Q. B.

988. This hardly seems to follow the principle laid down by the C. A., *supra*, and the decision has been reversed on appeal on another ground. See *ante*, p. 322.

(*x*) *In re Serle*, [1898] 1 Ch. 652.

(*y*) *Id.* The reasoning, however, seems inconclusive. If the notice in respect of each covenant had been on a separate piece of paper, would it not have been sufficient for re-entry?

answer to the former complaint, and if not, whether they could make terms with their lessors (*z*). It has, however, been decided that the presence in the notice of a claim which is not in law justifiable (*a*), or which turns out in fact not to be justifiable (*b*), does not render the notice invalid altogether; and it is submitted that this is the correct principle, and that notices relating to different breaches of covenant are properly separable, though any embarrassment that may be caused to the tenant by including them in a single document should be held to afford ground for relief under the clause (*c*) which applies to that subject.

The "particular breach complained of," which the notice must specify, refers only to the particular condition of the premises which the tenant is required to remedy, and he "fails . . . to remedy the breach" if he neglects to deal with the condition of the premises so pointed out (*d*). Hence where in a case of non-repair due notice was given under the Act, and in an action of ejectment brought subsequently rent was claimed down to a time later than the expiration of the notice (so that the forfeiture down to that time was waived (*e*)), it was held that the covenant being a continuing one the right to possession in respect of non-repair between that time and that of the issue of the writ was unaffected, and that (the physical condition of the premises being the same when the action was brought as when the notice was given) the lessor could enforce that right without giving a fresh notice (*f*).

The statute, it will be observed, does not require that the notice should prescribe any time within which the breach must be remedied. Where a lessee covenanted both to repair generally and to repair within three months after notice from the lessor (*g*), and a right of re-entry was reserved to the latter on breach of any of the covenants of the lease, the opinion was expressed (*h*) that one month's notice to repair might be sufficient to satisfy the statute, notwithstanding the stipulation of the lease (*i*).

(*s*) *Horsey Estate v. Stetger*, *supra*. See, however, last note. And may not the decision really be rested on the ground that even if there had been no complaint of non-repair at all the lessees were entitled to more than the time given them for considering the question of offering compensation, and applying for relief, in respect of the other breach?

(*a*) *Lock v. Pearce*, [1893] 2 Ch. 271. The question, however, here does not seem to have been seriously raised.

(*b*) *Pannell v. City of London Brewery Co.*, [1900] 1 Ch. 496.

(*c*) Sub-s. (2), *infra*.

(*d*) Per Collins, L. J., in next-cited case.

(*e*) *Supra*, pp. 651—656.

(*f*) *Penton v. Barnett*, [1898] 1 Q. B. 276.

(*g*) See *ante*, p. 217.

(*h*) By Kekewich, J.

(*i*) *In re Serle*, *supra*. The notice, as already mentioned, was held bad.

The effect of the above enactment is not to alter the contract between the parties by preventing the neglect to comply with a covenant from being a breach of the covenant until the notice has been given, but merely to provide a means by which relief (*k*) may be given for such a breach, assuming that the breach has been committed (*l*); or, as it may be otherwise expressed, not to take away any right of re-entry which the landlord may have, but merely to postpone it till he has taken the steps which the statute requires (*m*). The statute clearly contemplates that a reasonable interval shall elapse after service of notice and before action (*n*).

It is also to be observed that the Act is one in relief of the *tenant*, and will not relieve the landlord of any burden which independently of the Act would have been cast upon him before he could enforce a forfeiture (*o*). Thus the Act, for example, has not (as it has been held) altered the principle requiring the landlord in forfeiture for breach of the covenant to repair to show that the premises were out of repair at the date of the writ, and mere proof of non-repair at the date of the notice given under the Act is insufficient (*p*). For the same reason the landlord cannot under the Act claim from the tenant repayment of a fee paid by him for a survey of the dilapidations (*q*); nor is such expense—and the same thing applies to a sum paid by the landlord to a solicitor for the preparation of the notice itself—within the “reasonable compensation in money to the satisfaction of the lessor” mentioned in the Act, for it arises not from the breach of the covenant, but from the fetter imposed by the statute on the enforcement of the cause of action arising from that breach (*r*). (It is, however, now specifically provided (*s*), that “a lessor shall be entitled to recover as a debt due to him from a lessee (*t*), and in addition to damages, if

(*k*) See more particularly sub-s. (2), *infra*, p. 662.

(*l*) *Coatsworth v. Johnson*, 55 L. J. Q. B. 220, per Lord Esher, M. R.

(*m*) *Creswell v. Davidson*, 56 L. T. 811, per Kay, J.

(*n*) *Horsely Estate v. Steiger*, *supra*.

(*o*) *Skinners' Co. v. Knight*, 63 L. T. 698, per Charles, J.

(*p*) *Skinners' Co. v. Knight*, *supra*. The correctness, however, of the proposition that the above principle held good before the Act seems, it is submitted, open to serious question, on the ground that the landlord made out a *prima facie* case by showing non-repair at any time during the lease, and that it then lay upon the tenant to show that

the premises had been put into repair before the right of re-entry accrued (*Doe v. Durnford*, 2 C. & J. 667), or that the forfeiture had been waived (*Cole, Ejec. 427*). The decision was affirmed (C. A.) on another ground: see *infra*, note (*r*).

(*q*) *Skinners' Co. v. Knight*, *supra*. The authority for the proposition before the Act is *Logan v. Cox*, cited in *Mayne on Damages*, p. 291 (7th ed.); *ante*, p. 231.

(*r*) *Skinners' Co. v. Knight*, [1891] 2 Q. B. 542.

(*s*) 55 & 56 Vict. c. 13, s. 2, sub-s. (1).

(*t*) This does not include an under-lessee as between the lessor and himself: *Nind v. Nineteenth Century Building Society*, [1894] 2 Q. B. 226.

any, all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture . . . from which the lessee is relieved (*u*) under the provisions of" the amended or the amending Act.) And notwithstanding the general terms of the notice required by the section (*x*), the lessee is, under the above provision, bound to make compensation; not absolutely in every case, but only where there is something to compensate (*y*). Such compensation, as it seems, is to be measured by the same rule as damages in an action for the breach (*y*).

By sect. 14, sub-s. (2) of the Conveyancing Act, 1881, "where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise (including the granting of an injunction to restrain any like breach in the future), as the Court in the circumstances of each case thinks fit." The application should be made to the Chancery Division (*z*), unless made "in the lessor's action" brought in the King's Bench Division (*a*). In the latter Division it may be made by summons (*b*); in the former an action must be commenced in the ordinary way by writ, and the procedure by originating summons cannot be resorted to (*c*). The only person empowered to make the application is, as will be noticed, the

(*u*) It has been said by a majority of judges in a considered judgment of the C. A.—the *dictum* was not necessary for the actual decision of the case—that these words "point to some action of the Court on the relations of the two parties . . . pursuant to powers conferred by the Act," or in other language that the provision only applies where the Court has been applied to by the lessee for relief (*Nind v. Nineteenth Century Building Society*, *supra*). It will be observed that in this case the lessees had complied with the notice, so that (as mentioned by Davey, L. J.) there was nothing from which they required to be relieved at all.

(*x*) See p. 657, *supra*.

(*y*) *Skinnors' Co. v. Knight*, *supra*.

(*s*) Sect. 69, sub-s. (1). It is thought that the *dictum* as to the general non-applicability of this sub-section to proceedings for relief under s. 14 in *Cholmeley's School (Warden of) v. Sewell*, [1893] 2 Q. B. 254 (reported as *Highgate School (Warden of) v. Sewell*, 41 W. R. 637), should be restricted as stated (with regard to sub-s. (3)) *infra*, p. 665.

(*a*) As to the jurisdiction of the County Court in this matter, see *post*, p. 795.

(*b*) See, e.g., *Bond v. Freke*, W. N. 1884, p. 47; *Burt v. Gray*, [1891] 2 Q. B. 98.

(*c*) See *Look v. Pearce*, [1893] 2 Ch. 271.

lessee (*d*); but where he has allowed judgment to go against him by default, the fact that a notice complying with the requirements of the section has not been given is a material element in deciding whether third parties interested in the premises, *e.g.*, equitable mortgagees, may not apply (in compliance with the Rules of Court under the Judicature Acts) to have the judgment set aside (*e*).

The relief in question may be given to the tenant in an action of ejectment brought against him though he has not claimed it by his pleadings (*f*); and, on the other hand, it has been held that it may be refused to him even where the notice required by sub-section (1) has not been given by the lessor (*g*). It cannot, however, be claimed by the tenant after the landlord has already re-entered (*h*), unless such re-entry has only taken place after proceedings for claiming it have been commenced (*i*); whilst if it be claimed after judgment for possession has been signed against the tenant, but before re-entry, it seems that should relief be given a new lease ought to be granted, as the old lease is gone and cannot be revived (*k*). The mere fact that serious breaches of a covenant (*e.g.*, to repair) may have taken place will not prevent the discretion of the Court from being exercised (*l*). Where in an action for re-entry upon breach of the covenant to repair the tenant applies to the Court for relief under *this* sub-section, the Court may in its discretion make an order to stay the action only upon payment by him of the landlord's costs as between solicitor and client, as well as the costs of surveys and schedules of dilapidations (*m*). And now that it has been provided that the landlord

(*d*) See *North London, &c., Land Co. v. Jaques*, 49 L. T. 659; and, as to the meaning of the word "lessee," *infra*, p. 664. The actual decision, however, in the above case has been disapproved of: see note (*i*), *infra*.

(*e*) *Jacques v. Harrison*, 12 Q. B. Div. 165, cited *post*, p. 779.

(*f*) *Mitchison v. Thomson*, C. & E. 72, Lord Coleridge, C. J.

(*g*) *Scott v. Matthew Brown & Co.*, 51 L. T. 746, where even an action by the tenant for illegal entry seems to have been dismissed, to a certain extent at least, on this ground. But it is not thought that the decision can be regarded as an authority for the proposition that, in a case to which the Act applies, the notice it requires can ever be dispensed with.

(*h*) *Quiller v. Mapleson*, 9 Q. B. Div. 672, per Jessel, M. R.; *Rogers v. Rice*, [1892] 2 Ch. 170.

(*i*) *Lock v. Pearce*, *supra*. A dictum of Lindley, L. J., in *Rogers v. Rice*, *supra*, seems to suggest that relief can be claimed after re-entry where a notice complying with the requirements of the section has not been given. But in the case there cited (*supra*, note (*d*)) the application for relief was not by the lessee, and the case cited itself is no longer of authority: see *Lock v. Pearce*, *ubi sup*.

(*k*) See *West v. Rogers*, 4 T. L. R. 229; and *cp. C. L. P. Act, 1852, s. 212*, cited *infra*, p. 673.

(*l*) See *Mitchison v. Thomson*, *supra*.

(*m*) *Bridge v. Quick*, 61 L. J. Q. B. 375. In *Skinnners' Co. v. Knight*, [1891] 2 Q. B. 542, cited *supra*, p. 661, it should not be overlooked that the decision as to liability for expenses of survey, &c., was under sub-s. (1).

may recover costs and expenses of this kind from the tenant by action of debt (*n*), it is probable that the discretion in question will be freely exercised.

For the purposes of the section, a lease includes (*o*) an original or derivative underlease, and the words "lessor" and "lessee" include an original or derivative underlessor and underlessee respectively, and also the heirs, executors, administrators, and assigns of a lessor and a lessee respectively. An assignee of a lessee is thus in terms within the section (*p*); but whether this would apply to an assignee of part only of the premises, having regard to the difficulty of giving relief equitably in such a case (*q*), must be considered doubtful. An underlessee, at all events—whether of the whole or of part of the premises comprised in a lease—as between him and the superior landlord, is not (*r*); for the Act was not intended to create a privity where there was none before, but only to grant relief where there was privity already (*q*).

It is, however, now provided (*s*), that "where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the Court may, on application by any person claiming as underlessee (*t*) any estate or interest in the property comprised in the lease, or any part thereof, either in the lessor's action, if any, or in any action brought by such person for that purpose, make an order vesting, for the whole term of the lease or any less term, the property comprised in the lease, or any part thereof, in any person entitled as underlessee to any estate or interest in such property, upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security or otherwise, as the Court in the circumstances of each case shall think fit; but in no case shall any such underlessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease." This provision, it may be noticed, does not in any way revive the estate of the underlessee, which, as already seen (*u*), is destroyed by the forfeiture of the lease, but vests in him an estate which is altogether new (*x*).

(*n*) 55 & 56 Vict. c. 13, s. 2, sub-s. (1); *supra*, p. 661.

(*o*) 44 & 45 Vict. c. 41, s. 14, sub-s. (3).

(*p*) *Cronin v. Rogers*, C. & E. 348, Denman, J.

(*q*) See *Burt v. Gray*, [1891] 2 Q. B. 98, per Mathew, J.

(*r*) *Nind v. Nineteenth Century Building Society*, [1894] 2 Q. B. 226; *Cremwell*

v. Davidson, 56 L. T. 811, per Kay, J.; *Burt v. Gray*, *supra*.

(*s*) 55 & 56 Vict. c. 13, s. 4.

(*t*) "Underlessee" includes any person deriving title under or from an underlessee: sect. 5.

(*u*) *Supra*, p. 650.

(*x*) *Ewart v. Fryer*, [1901] 1 Ch. 499; *affd.*, *Fryer v. Ewart*, [1902] A. C. 187

Where the underlessee is a party to the lessor's action, he may set up the claim to a vesting order given to him by the above section by way of defence and counterclaim in the action, without applying by summons at chambers (*y*). The provision, it may be added, applies in favour of underlessees, even where the cause of forfeiture is one against which the Acts (read though they be, as will be presently mentioned, together) give no relief (*z*) to the lessee (*a*); for the enactment in question is a general enabling clause, by which the Court is empowered to give relief to an underlessee in the case of forfeiture under any covenant, proviso, or stipulation in a lease (*e.g.*, for non-payment of rent), on such conditions as appear to the Court to be just (*b*). But the relief which it affords is one which will be sparingly applied, and the applicant ought to be in a position to prove that he is blameless and that he has exercised all the precautions which a reasonably careful person would employ; so that where a person purchased an underlease under a contract which did not give him the right to call for the title of the original lessee (*c*), who was under a covenant not to assign or underlet without licence, the relief was refused, though he had expended a considerable sum on the premises (*d*). Moreover, the Court can, under the provision in question, only grant relief from the consequences of past forfeiture, and cannot do anything to condone a continuing breach in the future (*e*).

On the other hand, the discretion given to the Court by the statute is a very wide one; and the words "payment of rent" in particular have been held to intend not merely the rent due up to

(reported as *Watney v. Ewart*, 86 L. T. 242); *Serjeant v. Nash*, [1903] 2 K. B. 304, per Stirling, L. J.

(*y*) *Cholmeley's School (Warden of) v. Sewell*, [1893] 2 Q. B. 254 (reported as *Highgate School (Warden of) v. Sewell*, 41 W. R. 637). For sect. 69, sub-s. (3) of the Act of 1881 does not apply to proceedings for relief against forfeiture where the lessor's action is brought in the K. B. D.: *id.*; cf. *supra*, p. 662, note (*z*).

(*z*) See 44 & 45 Vict. c. 41, s. 14, sub-s. (6), *infra*, p. 668, and sub-s. (8), *infra*, p. 669. In the case next cited the premises (as appears from the report of the case in 10 T. L. R. 509) consisted of a public-house, and therefore the case (one of forfeiture by bankruptcy) did not fall within 55 & 56 Vict. c. 13, s. 2, sub-s. (2); *infra*, p. 669.

(*a*) *Cholmeley's School (Wardens of) v. Sewell*, [1894] 2 Q. B. 906; *Imray v. Oakshette*, *infra*. In the former case the relief was given on the terms that the underlessees should enter into the lessee's personal covenants, but without imposing payment of a higher rent than the lessee had agreed to pay, though the value of the premises had increased. In the next-cited case relief on similar terms was given conditionally on the underlessees making good breaches (if any) of the covenants to repair contained in the original lease.

(*b*) *Gray v. Bonsall*, [1904] 1 K. B. 601.

(*c*) See *ante*, p. 347.

(*d*) *Imray v. Oakshette*, [1897] 2 Q. B. 218.

(*e*) *Batson v. School Board for London*, 69 J. P. 9.

the time when the vesting order is made, but—like the words “giving security”—to point also to the future, and to empower the Court to direct the payment by way of rent of such a sum as would be fair, having regard to the interests of all parties and to all the circumstances of the case (*f*). And in exercising such discretion it is a material consideration that the underlessee, who must treat the lessor as having vested in him all the rights of the lessee, should not get any advantage out of the forfeiture (*g*). In the absence of any special circumstances, the costs of the new lease, and of any inquiry which may be necessary as to the amount of the rent which should be paid, will fall upon the underlessee (*h*).

Where a part only of premises included in a lease was underlet at a proportionate rent, it was held, upon forfeiture of the lease for non-payment of rent, that the underlessee, though he could not be compelled to take a lease of the whole premises (notwithstanding an allegation by the lessors that the portions not comprised in the underlease could only let by themselves with great difficulty), was entitled to relief only on the terms of paying the whole arrears of rent due to the lessors under the head lease down to the time of recovery of possession against the lessees, and after that time a fair rent (to be ascertained by inquiry) for the premises comprised in the underlease, together with the costs of the proceedings (*i*).

The section of the Conveyancing Act, 1881, now under discussion has been held not to apply to an agreement for a lease of which, without regard to the Act, specific performance would not be decreed (*k*), though where specific performance would be given without regard to the Act the agreement has been held to be within its scope (*l*). The Conveyancing Act, 1892 (*m*), however, now specifically provides (*n*) that in both Acts, which are to be read together (*o*), the word “lease” shall include an agreement

(*f*) *Ewart v. Fryer*, *supra*. In this case—also that of a public-house—the lessees, who were brewers, had made a “tied” underlease; and the rent made payable by the underlessee to the head lessors under the vesting order was directed to be increased (the amount to be ascertained by an inquiry) by reason of his being released from the tie.

(*g*) *Ewart v. Fryer*, [1901] 1 Ch. 499; *affd.*, *Fryer v. Ewart*, [1902] A. C. 187 (reported as *Watney v. Ewart*, 86 L. T. 242).

(*h*) *Ewart v. Fryer*, 86 L. T. 676; and *cf.* next-cited case.

(*i*) *London Bridge Buildings Co. v. Thomson*, 89 L. T. 50. It was held further that the underlessee, if he accepted the above terms, should be remitted, as far as any rent which might be recovered from the lessee or any other underlessee was concerned, to the rights of the lessors.

(*k*) *Coatsworth v. Johnson*, 55 L. J. Q. B. 220; *Swain v. Ayres*, 21 Q. B. Div. 289.

(*l*) *Strong v. Stringer*, 61 L. T. 470.

(*m*) 55 & 56 Vict. c. 13.

(*n*) Sect. 5.

(*o*) Sect. 1.

for a lease "where the lessee has become entitled to have his lease granted," and the word "underlease" an agreement for an underlease "where the underlessee has become entitled to have his underlease granted." But though it is possible that the legislature intended to place tenants under agreements on the same footing in this respect as those under leases, by providing that they may obtain relief whenever entitled to specific performance *independently of the breach complained of*, it seems doubtful whether the above provision does more than to make the right to specific performance in all cases a condition precedent to the granting of relief, and consequently to be only declaratory of the existing law. If so, the result would still be that a tenant holding under a mere agreement is excluded from the benefit of the Acts, for the commission of the breach upon which the forfeiture has accrued would in itself dis-entitle him to specific performance of the agreement (*p*), except where the breach is of an unimportant character (*q*), or where it has been waived (*r*), or in case of fraud, accident, or surprise (*s*); because in these cases specific performance, without regard to the Acts, may be obtainable. And it may be said that (except in the case of unimportant breaches and that of waiver) relief before the Acts was, apart from statute (*t*), granted in the case of a lease, and specific performance, on the same principles (*u*), in the case of an agreement, only in the event of fraud, accident, or mistake (*x*), or where some act of the landlord had misled the tenant into sup-posing that the strict rights arising under the contract would not be enforced (*y*). Mere forgetfulness, however, on the part of the lessee as to the covenants of his lease is not a "mistake" which will entitle him to relief, and *à fortiori* if due to the negligence of himself or his agent: nor does it make any difference that the act he has committed has been productive of no damage whatever to the lessor (*z*). The suggestion that it is a ground for relief in

(*p*) *Suain v. Ayres*, *supra*. See this matter discussed *ante*, p. 381.

(*q*) Not "gross" or "wilful": see p. 382, *ante*.

(*r*) *Strong v. Stringer*, *supra*.

(*s*) See at note (*y*), *infra*.

(*t*) The Courts had statutory power to relieve in the case of forfeiture for non-insurance (22 & 23 Vict. c. 35, ss. 4—9, and 23 & 24 Vict. c. 126, s. 2, both repealed by the Conv. Act, 1881, s. 14, sub-s. (7), now itself repealed, with the usual saving, by the Stat. Law

Rev. Act, 1894 (57 & 58 Vict. c. 56)), and for non-payment of rent (as to which, see p. 673, *infra*).

(*u*) *Gregory v. Wilson*, 9 Hare, 683.

(*x*) See the judgments of the C. A. in *Barrow v. Isaacs*, [1891] 1 Q. B. 417.

(*y*) *Hughes v. Metropolitan Ry. Co.*, 2 App. Ca. 439; *Birmingham, &c., Land Co. v. L. & N. W. Ry. Co.*, 40 Ch. Div. 268. Many of the cases before the Acts will be found in 2 Wh. & Tud. L. C. 258 *et seq.* (7th ed.), notes to *Sloman v. Walter*.

(*z*) *Barrow v. Isaacs*, *supra*.

equity, against the enforcement by the landlord of his legal right, that the tenant has committed the breach of covenant either through thoughtlessness or because he regarded the breach as unimportant, has no foundation in principle or authority (*a*).

The section in question "does not extend (*b*) to a covenant or condition against the assigning (*c*), underletting, parting with the possession, or disposing of the land leased"—nor apart from the Acts will relief be given as a rule (*d*) in such a case (*e*),—"or to a condition for forfeiture on the bankruptcy (*f*) of the lessee (*g*), or on the taking in execution of the lessee's interest" (*h*). This provision clearly deals with two different groups of covenants or conditions, the former relating to express disposals of the land leased, and the latter relating to the solvency of the lessee (*i*). The former only include covenants or conditions which upon the face of them are absolute provisions against disposing of the land leased, and not, for instance, a covenant against an assignment for the benefit of creditors, which may or may not, according to its form, include a disposal of the land leased (*k*), and which has for its real object to provide against the insolvency of the lessee, the object aimed at, as just stated, by the covenants not of the former but the latter class (*l*). In any lease, however, of premises *other than those of the following character* (*m*),—" (*a*) agricultural or pastoral land ; (*b*) mines or minerals ; (*c*) a house used or intended to be used as a public-house or beershop ; (*d*) a house let as a dwelling-house with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures ; (*e*) any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him,"—the operation of the above provision restricting the

(*a*) *Eastern Telegraph Co. v. Dent*, [1899] 1 Q. B. 835, per Romer, L. J.

(*b*) 44 & 45 Vict. c. 41, s. 14, sub-s. (6).

(*c*) See, on this covenant, *ante*, p. 269.

(*d*) See last paragraph.

(*e*) *Hill v. Barclay*, 18 Ves. at p. 63, per Lord Eldon, L. C.; *Barrow v. Isaacs*, *supra*.

(*f*) Defined in sect. 2 (15), by words sufficiently wide, as it has been held, to include liquidation or winding-up in the case of a lease to a company: *Horsey Estate v. Steiger*, [1899] 2 Q. B. 79; *Fryer v. Ewart*, [1902] A. C. 187 (reported as *Watney v. Ewart*, 86 L. T. 242).

(*g*) See *Ex parte Gould*, 13 Q. B. D. 454 (reported as *Re Walker*, 51 L. T. 368); *ante*, p. 319.

(*h*) Nor in the case of a mining lease (defined in sect. 2 (11)) to a covenant or condition for allowing the lessor to inspect books, weighing machines, &c., or the mine itself and its workings: sub-s. (6).

(*i*) Per Romer, L. J., in next-cited case.

(*k*) Per A. L. Smith, L. J., in next-cited case.

(*l*) *Gentle v. Faulkner*, [1900] 2 Q. B. 267.

(*m*) 55 & 56 Vict. c. 13, s. 2, sub-s. (3).

power of the Court to grant relief has now, in the case of bankruptcy and execution, been itself restricted by an enactment (*n*), the effect of which is that the provision in question is only to apply after the expiration of one year from the date of the bankruptcy or execution, and that if the lessee's interest be sold within such one year it is not to apply at all. That effect has been expressed by saying that the provision now spoken of takes the case of forfeiture for the specified causes out of the cases in which notice is not necessary for one year (*o*).

The words of the enactment, which is very inartificially drawn, are as follows (*p*):—"Sub-section (6) of section 14 of the Conveyancing and Law of Property Act, 1881, is to apply to a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest, only after the expiration of one year from the date of the bankruptcy, or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, sub-section (6) shall cease to be applicable thereto." The sale contemplated by this clause must be one completed by conveyance, or the contract entered into must be an absolute one for sale (*q*).

It should be noticed that if there be breaches of several covenants in a lease, and relief can be given as regards some, but not as regards others, the Court will not restrain a forfeiture (*r*).

The enactments here considered do not (except so far as underlessees are concerned (*s*)) affect the law as to re-entry or forfeiture or relief in case of non-payment of rent (*t*).

Forfeiture for non-payment of rent.—The law relating to forfeiture for non-payment of rent requires separate consideration.

Right of re-entry.—(*a*) At common law.—At common law no forfeiture on this ground could be enforced without a formal demand of the rent having been made (*u*), according to strict rules which may be set forth as follows (*v*):—(1) The demand must be made by the landlord or a duly authorized agent; if made,

(*n*) 55 & 56 Vict. c. 13, s. 2, sub-s. (2).

(*o*) *Horsey Estate v. Steiger*, [1899] 2 Q. B. 79. See, too, *In re Riggs*, [1901] 1 K. B. 16, cited *post*, p. 763.

(*p*) Sub-s. (3), providing that "sub-section (2) of this section is not to apply to any lease of agricultural or pastoral land," &c., has been set out *supra*.

(*q*) *In re Castle*, 94 L. T. 396.

(*r*) *Nokes v. Gibbon*, 3 Drew. 681.

(*s*) *Supra*, p. 665.

(*t*) 44 & 45 Vict. c. 41, s. 14, sub-s. (8).

(*u*) *Hill v. Kempshall*, 7 C. B. 975.

(*v*) *Cole, Ejec.* 412; *Notes to Dupper v. Mayo*, 1 Wms. Saund. 434 *et seq.* (ed. 1871).

however, by the latter, he need not produce his authority if not requested at the time to do so by the tenant (*x*). (2) It must be made precisely upon the day when the rent is due and payable by the lease to save the forfeiture (*y*), and at such convenient hour before sunset (*z*)—a demand at half-past ten (*a*) or at one o'clock (*b*) of the day is consequently bad—as will give time enough to count the money before sunset (*c*): the demand being continued till sunset by the person who makes it remaining on the land until, or returning thereto at, that time (*d*). (3) It must be made at the proper place, *i.e.*, at the place, if any, specified for payment of the rent; or if no such place be specified, then on the land and at the most notorious place of it, *e.g.*, the front door of a dwelling-house (*e*). If made on the land it is sufficient though addressed to a person, *e.g.*, a sub-tenant, who is a stranger to the lessor (*f*); but the mere fact of there being no one to whom to address it will not absolve the latter from making it (*g*). (4) It must be of the precise sum due, and must disclose to what rent exactly it relates (*h*), and if more than one instalment be due it must relate only to the last, or it will be wholly bad (*i*).

Sometimes the proviso itself stipulates in terms for a demand of the rent being made, and when this is the case it seems that an ordinary demand, without the above formalities, will be sufficient (*k*). If it provide for re-entry on non-payment of the rent within a specified number of days after it becomes due, "being demanded," such demand can only be made after the last of those days has expired (*l*).

More frequently, however, the above difficulties are got rid of by an express stipulation for re-entry on non-payment without any demand, or (what comes to the same thing, for it does away with the necessity for *any* demand) without any "legal or formal" demand (*m*), being made at all (*n*).

It would seem that the mere fact that an action has been

(*x*) *Roe v. Davis*, 7 East, 368.
 (*y*) 1 Wms. Saund. 435 (ed. 1871);
Doe v. Wandlass, 7 T. R. 117.
 (*z*) Co. Lit. 202 a.
 (*a*) *Acocks v. Phillips*, 5 H. & N. 183.
 (*b*) *Doe v. Paul*, 3 C. & P. 613.
 (*c*) *Tinchler v. Prentice*, 4 Taunt. 549.
 (*d*) *Wood and Chivers's case*, 4 Leon.
 179.
 (*e*) Co. Lit. 201 b; Cole, Ejec. 413;
 1 Wms. Saund. 435, 436.

(*f*) *Doe v. Brydges*, 2 D. & Ry. 23.
 (*g*) Co. Lit. 201 b.
 (*h*) *Fabian v. Winston*, Cro. Eliz. 209.
 (*i*) *Soot v. Scot*, Cro. Eliz. 73; *Doe v.*
Paul, *supra*.
 (*k*) See *Manser v. Diz*, 8 D. M. & G.
 703, and next-cited case.
 (*l*) *Phillips v. Bridge*, L. R. 9 C. P. 48.
 (*m*) *Doe v. Masters*, 2 B. & C. 490.
 (*n*) *Dormer's case*, 5 Co. 40 a; *Good-*
right v. Cator, 2 Doug. 477.

brought, and judgment signed, for the rent upon the non-payment of which the forfeiture is founded will not prevent that remedy from being obtained if the judgment has not been satisfied (*o*).

(b) By statute.—The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), now provides that a formal demand of the rent may sometimes be dispensed with; for it enacts (*p*) that “in all cases between landlord and tenant, as often as it shall happen that one half-year’s rent shall be in arrear, and the landlord or lessor to whom the same is due hath right by law (*q*) to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a writ in ejectment (*r*) for the recovery of the demised premises . . . which service . . . shall stand in the place and stead of a demand and re-entry; and in case of judgment against the defendant for non-appearance, if it shall be made to appear to the Court where the said action is depending, by affidavit, or be proved upon the trial in case the defendant appears, that half a year’s rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made.”

It has been decided that the presence in the proviso of express words requiring a demand does not prevent the operation of the statute, and that, consequently, if its requirements are satisfied no demand is necessary (*s*). Such requirements are as follows (*t*) :—

(1) The ejectment must be between landlord and tenant. But a “tenant” in the above section includes an underlessee (*u*), and an assignee, though only by way of mortgage (*x*).

(2) One half-year’s rent at least must be in arrear at the time the writ is served (*y*). The landlord’s agent who has been in the habit of receiving the rent on his behalf is competent to prove the non-payment (*z*). As has already been stated (*a*), a distress made after

(*o*) See *Wakefield v. Smythe*, 16 Ir. C. L. Rep. 173. Cf. *ante*, p. 557.

(*p*) Sect. 210 (as modified by 55 & 56 Vict. c. 19), re-enacting 4 Geo. 2, c. 28, s. 2.

(*q*) See *post*, p. 803, note (*y*).

(*r*) As to this see *post*, pp. 765 *et seq.*

(*s*) *Doe v. Alexander*, 2 M. & S. 525; *Doe v. Wilson*, 5 B. & A. 363.

(*t*) *Cole, Ejec.* 416.

(*u*) See *Doe v. Byron*, 1 O. B. 623.

(*x*) *Doe v. Roe*, 8 Taunt. 402; explained in *Hare v. Elms*, [1893] 1 Q. B. 604, cited *infra*, p. 675.

(*y*) See per A. L. Smith, L. J., in *Thomas v. Lulham*, [1895] 2 Q. B. 400.

(*z*) *Doe v. Roe*, 2 Dowl. 752.

(*a*) *Supra*, p. 652.

forfeiture under the statute does not operate as a waiver (*b*); but if it realize enough to reduce the amount owing to less than half a year's rent, the statute no longer applies, and the right to re-enter under it is gone (*c*).

(On the other hand, in an *express* proviso for re-entry, "*if and whenever* any one quarter's rent, or any part thereof, shall be in arrear for twenty-one days, and no sufficient distress can be had for the same," the right of re-entry accrues whenever the two specified conditions, viz., a quarter's rent in arrear for twenty-one days, and no sufficient distress for the same, are fulfilled, and is not therefore displaced by the fact of a distress having been levied for three quarters' rent which has actually realized less than two (*d*).)

(3) There must be an absence of sufficient distress found on the premises countervailing the arrears due (*e*), *i.e.*, countervailing *all* the arrears due, and not merely half a year's rent where more is due (*f*). A strict search must be made of all the premises included in the demise to ascertain whether this is the case (*g*), and the prospective value of goods which are incapable of being realized by distress at the time of seizure (*e.g.*, growing crops) must be taken into account (*h*).

But where the premises demised consisted of more than one house, and one of them having been deserted by the lessee had been taken possession of by the lessor, who had placed in it a caretaker (upon whose goods, therefore, no distress could be made), it was held that in ejectment for the other houses the search need not extend to that one (*i*). And goods are not "to be found" on the premises, unless they are so visibly there that a broker going to distrain would, by using reasonable diligence, find them so as to be able to distrain them (*k*); as, for instance, where the outer doors of the premises are kept locked (*l*).

It does not seem to have ever been expressly decided whether it

(*b*) *Thomas v. Lulham*, *supra*. It will be noticed that the lease in this case expressly dispensed with a demand, so that there was no necessity for the lessor to have recourse to the statute at all, and consequently the distress can hardly be said to have been levied in order to satisfy it.

(*c*) *Cotesworth v. Spokes*, 10 C. B. N. S. 103.

(*d*) *Shepherd v. Berger*, [1891] 1 Q. B. 597.

(*e*) *Doe v. Wandlass*, 7 T. R. 117.

(*f*) *Cross v. Jordan*, 8 Exch. 149.

(*g*) *Rees v. King*, Forr. 19.

(*h*) *Ex parte Arnison*, L. R. 3 Ex. 56.

(*i*) *Wheeler v. Stevenson*, 6 H. & N. 155.

(*k*) *Doe v. Franks*, 2 C. & K. 678.

(*l*) *Doe v. Dyson*, Moo. & M. 77; *Doe v. Roe*, 5 D. & L. 272; *Hammond v. Mather*, 3 F. & F. 151.

is necessary actually to make a distress, if the landlord should be able to show *aliunde* that it must, if made, have proved unfruitful. From the employment of the words "was to be found," instead of "was found," in the statute it might, perhaps, be inferred that there is no such necessity. On the other hand, the opinion has been expressed, in the Court of Appeal, that a distraint is necessary because goods are not properly a "distress" until a levy takes place (*m*). The statute does not appear to prescribe when the distress should be levied, and it is presumed that it may be levied at any time before the writ in ejectment is served (*n*).

(4) The lessor must have a right of re-entry for non-payment of the rent reserved to him by the lease (*o*), and such right must have accrued at the time the writ is served (*p*). The right, however, does not date merely from the time of such service, but from the time when the forfeiture would have accrued at common law if a demand had been duly made (*q*).

The right of re-entry reserved to the lessor must, in order to satisfy the statute, be absolute, enabling him to avoid the lease: a mere right to re-enter and hold until the arrears are paid is not sufficient (*r*). But, apart from the statute, it would seem that in such a case no demand is necessary at all (*s*).

Relief.—It has already been stated (*t*) that this ground of forfeiture is not affected by the Conveyancing Act.

By the Common Law Procedure Act, 1852 (*u*), s. 212, however, if, upon an ejectment for non-payment of rent being brought, there being a half-year's rent in arrear and a right of re-entry reserved by the lease (*x*), the tenant or his assignee, at any time before trial (*y*).

(*m*) *Thomas v. Lulham*, [1895] 2 Q. B. 400, where, however, the point did not actually arise for decision.

(*n*) In *Doe v. Fuchau*, 15 East, 286, the difficulty arose from the distress, which was not under the statute, but to satisfy the provisions of a lease, having been levied after the "day of the demise" laid, according to the old practice, in the declaration.

(*o*) *Brewer v. Eaton*, 3 Doug. 230, per Lord Mansfield, C. J.

(*p*) *Doe v. Roe*, 7 C. B. 134.

(*q*) *Doe v. Shavcross*, 3 B. & C. 752.

(*r*) *Doe v. Bowditch*, 8 Q. B. 973.

(*s*) *Jemott v. Cowley*, 1 Wms. Saund.

F.

132 (ed. 1871), and note; *Doe v. Horsley*, 1 A. & E. 766.

(*t*) *Supra*, p. 669.

(*u*) 15 & 16 Vict. c. 76.

(*x*) It is conceived (although the point after the *dicta* of Stirling, J., in *Howard v. Fanshawe*, [1895] 2 Ch. at pp. 591-2, seems doubtful) that *where ejectment has been brought* this follows from the use of the word "such" in the section, but that it is not necessary to show an absence of sufficient distress, which, as already seen, is required to dispense with a demand under sect. 210: see *Roe v. Davis*, *infra*.

(*y*) *Roe v. Davis*, 7 East, 363; *Doe v. Masters*, 2 B. & C. 490.

pay or tender to the landlord or pay into court all the arrears, together with the costs, proceedings in the ejectment shall be discontinued. This, it may be observed, is only in affirmance of the common law, for it was always the practice of the Court to stay proceedings in an action of ejectment for non-payment of rent where the rent was brought into court pending the action (*z*); and it is thought that such procedure may still be resorted to where less than a half-year's rent is in arrear. The word "tenant" in this section includes an underlessee (*a*), and apparently any person against whom ejectment is brought (*b*); nor is it necessary for him to show his title under the original lessee (*c*).

By sect. 211, even after trial and judgment, the tenant or any person claiming under the lease may, within six months after execution, apply for relief to a Court of equity (or to any Court or to a judge who shall have power upon rule or summons to give the same relief in a summary manner (*d*)); but such person "shall not have or continue any injunction against the proceedings at law on such (*e*) ejectment,"—so that this section does not apply where there has been no application for an injunction but the lessor has resumed and remained in possession (*f*),—unless within forty days of the landlord's defence to his application he pay into court such sum as appears from that defence to be due and in arrear over and above all just allowances, together with the taxed costs of the action of ejectment (*g*). Where, however, such relief is granted, it is provided that the lessee or other person relieved shall hold and enjoy the demised premises according to the lease thereof made without any new lease (*h*). This provision has been held to extend to cases where the landlord has re-entered without suing in ejectment at all (*i*), and where relief has been given under the general jurisdiction of the Court, as formerly exercised by the Courts of Chancery (*j*): a jurisdiction not

(*s*) See *Hare v. Elms*, [1893] 1 Q. B. at p. 607, per Day, J.

(*a*) *Doe v. Byron*, 1 C. B. 623. As to the underlessee's right to relief (in case of non-payment of rent) under the Conveyancing Act, see p. 664, *supra*.

(*b*) *Doe v. Byron*, *supra*, per Erle, J.

(*c*) *Moore v. Smee*, [1907] 2 K. B. 8. In this case rent had been paid by the underlessee to the head lessor.

(*d*) 23 & 24 Vict. c. 126, s. 1. This power only applies where an action of ejectment has been brought, and not where the landlord has re-entered (see

post, p. 763) without legal process: *Wilson v. Bolton*, 10 T. L. R. 17.

(*e*) See note (*z*), *supra*.

(*f*) *Bowser v. Colby*, 1 Hare, 109.

(*g*) The section contains also directions for adjusting accounts between the parties when relief is granted.

(*h*) Sect. 212. The same thing applies where relief is given under the C. L. P. Act, 1860. See at note (*d*), *supra*; *Gray v. Bonsall*, [1904] 1 K. B. 601.

(*i*) *Post*, p. 763.

(*j*) *Howard v. Fanshawe*, [1895] 2 Ch. 581.

confined to cases where the landlord has recovered possession by legal process, being founded on the long-established doctrine that the proviso for re-entry was in the eye of the Court simply a security for the rent (*k*). The application for relief may probably be made by an underlessee, whether by way of mortgage or otherwise, but it will not be granted—except under special circumstances (*l*)—in the absence of the lessee (upon whom a renewal of the forfeited lease would re-impose liability), who must therefore be made a party to the proceedings (*m*). And by sect. 210, if he suffer judgment and execution in such (*n*) ejectment to be had without paying the arrears, together with full costs (*o*)—*i.e.*, such costs as may be allowed to the landlord in the action of ejectment, for if he be deprived of its costs they are not within this section (*p*),—and without proceeding for relief within six months of such execution, his right thereto shall be wholly barred (*q*).

This section, as will be noticed, only excludes the tenant's claim to relief after the lapse of six months, and does not in terms entitle him as a matter of right to such relief if he apply within that time. Hence if the position of the parties has been altered in the meanwhile (*e.g.*, where the lessor has entered into an arrangement to let the premises to other persons) his application for relief, especially if it has been long delayed, will not be entertained (*r*). But if at the time of the application the position of the parties has undergone no change the discretion to grant relief vested in the Court will always be exercised (*s*).

The lessee's right to relief for non-payment of rent applies, not merely where the clause of forfeiture gives the lessor the right of re-entry, but even where it makes the lease null and void (*t*).

As will be seen hereafter (*u*), a landlord has now the right, in

(*k*) *Howard v. Fanshawe*, [1895] 2 Ch. 581.

(*l*) *Humphreys v. Morten*, [1905] 1 Ch. 739. In this case the lessee had entered many years before into a liquidation arrangement, under which the trustee had assigned the premises, and the assignee could not be traced; and relief was given to mortgagees by sub-demise in spite of an objection founded on the absence of the lessee and assignee.

(*m*) *Hare v. Elms*, [1893] 1 Q. B. 604; *Gray v. Bonsall*, *supra*.

(*n*) See note (*z*), *supra*.

(*o*) See *Humphreys v. Morten*, *supra*.

(*p*) *Croft v. London and County Banking Co.*, 14 Q. B. Div. 347.

(*q*) The section contains also a saving in favour of a mortgagee not in possession, provided that within six months of execution he pay the rent in arrear and costs, and perform all the covenants of the lessee. See *Newbolt v. Bingham*, cited *infra*.

(*r*) *Stanhope v. Haworth*, 3 T. L. R. 34.

(*s*) *Newbolt v. Bingham*, 72 L. T. 852.

(*t*) *Bowser v. Colby*, 1 Hare, 109.

(*u*) *Post*, p. 768.

the case of forfeiture for non-payment of rent, to avail himself of the summary procedure for judgment by means of a specially indorsed writ; and where such judgment has been obtained, it is specifically provided that a tenant shall have the same right to relief as if the judgment had been given after trial (*x*).

(*x*) R. S. C. 1888, O. 14, r. 10 (r. 3 of R. S. C. Jan. 1902).

CHAPTER VII.

THE STATUTE OF LIMITATIONS.

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<i>Tenancies at will</i>	677	<i>Tenancies enduring for a term of</i>	
<i>Periodic tenancies (without writing)</i>	680	<i>years</i>	682

THE present chapter deals with the modes in which the various kinds of tenancies determine by force of the Statute of Limitations.

Tenancies at will.—By 3 & 4 Will. 4, c. 27, s. 7, the right of the person entitled, subject to a tenancy at will in possession or by receipt of rent or profits (*a*), to make an entry or distress, or bring an action to recover the land, shall be deemed to have first accrued either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined.

Although the above provision is wholly silent on the point, it has always been assumed, what common sense seems to require, that express tenancies at will (*b*), in which a certain rent is reserved and paid, are not within it (*c*). Its construction is, that the right in question shall first accrue at the end of a year from the commencement of the tenancy at will, though it may accrue sooner by the actual determination of the tenancy (*d*); and the right must now be exercised within twelve years of the time it first accrues (*e*), at the end of which time it becomes extinguished (*f*). Nor can it be revived after that period by a re-entry (*g*), or by a devise to the tenant of an interest in the premises by a will the due execution of which he may have recognised by accepting other benefits under it (*h*).

(a) See sect. 35, cited *infra*, p. 685.

(b) *Ante*, p. 2.

(c) *Hodgson v. Hooper*, 3 E. & E. at p. 174, per Cockburn, C. J.; Sugden, *New Property Statutes*, 53, n. (2nd ed.).

(d) *Day v. Day*, 1. E. 3 P. C. at p. 760, citing Sugd., *ubi sup.*

(e) 37 & 38 Vict. c. 57, s. 1.

(f) 3 & 4 Will. 4, c. 27, s. 34.

(g) *Brassington v. Llewellyn*, 27 L. J. Ex. 297.

(h) *Doe v. Moore*, 9 Q. B. 555.

It follows that (subject to what is hereinafter stated as to the effect of a change in the reversion (*i*)) at the end of thirteen years at most after entry, a tenant at will paying no rent acquires an indefeasible title to the premises (*k*). This has been expressed by saying that the effect of the statute is to make a parliamentary conveyance of the land to the person in possession after the period of limitation has elapsed (*l*). When the statute has begun to run, its running will not be arrested by the mere fact that the tenancy (*e.g.*, by the tenant's sub-letting, or the owner's transferring the reversion, with the knowledge of the other party (*m*)) has been subsequently determined (*n*). But where, during its running, the owner has been restored to the possession, either by *actual* entry (*o*)—*i.e.*, entry accompanied by circumstances which divest the possession out of the tenant and revest it in the owner (*p*), for otherwise entry will not be sufficient (*q*): or *impliedly*, as by receiving rent from the person in occupation (*r*), or by entering into an agreement for a new tenancy (*s*),—the statute will cease to run from the time at which one of such events happens (*t*). Such new tenancy may be one either for years, from year to year, or at will (*u*); but a tenancy at sufferance (which cannot be created by agreement at all (*x*)) is not sufficient for this purpose (*y*). A tenancy, however, will suffice if it exist merely by estoppel between the parties, as in the case where, the former tenancy having been determined by the lessor's assigning his interest (*z*), he has parted with his reversion before its creation (*a*). It has been said (*b*) that the

(*i*) *Infra*, p. 682.

(*k*) See *Kingston Race Stand v. Mayor of Kingston*, [1897] A. C. 509. As to the saving of the statute by acknowledgment, see *infra*, p. 680.

(*l*) *Doe v. Sumner*, 14 M. & W. 39, per Parke, B.; and cf. *In re Jolly*, [1900] 2 Ch. 616, cited *infra*, p. 681.

(*m*) *Ante*, p. 597.

(*n*) *Day v. Day*, L. R. 3 P. C. 751; *Wimbledon Conservators v. Nicol*, 10 T. L. R. 247.

(*o*) *Randall v. Stevens*, 2 E. & B. 641; *Doe v. Groves*, 10 Q. B. 486, per Erle, J.; *Allen v. Englan*, 3 F. & F. 49.

(*p*) *Doe v. Coombes*, 9 C. B. 714, per Cresswell, J.; *Lynes v. Snaith*, [1899] 1 Q. B. 486 (where entry for the purpose of doing repairs was held insufficient, it not being shown that they were done against the tenant's will).

(*q*) 3 & 4 Will. 4, c. 27, s. 10.

(*r*) *Day v. Day*, L. R. 3 P. C. at p. 761.

(*s*) *Doe v. Turner*, 7 M. & W. 226; S. C. (*sub nom. Turner v. Doe*), 9 M. & W. 643, Ex. Ch.; *Doe v. Rook*, 4 M. & Gr. 80; *Locke v. Matthews*, 13 C. B. N. S. 753, where such tenancy was preceded by a writ in ejectment.

(*t*) *Day v. Day*, L. R. 3 P. C. at p. 761; notes to *Nepean v. Doe* and *Taylor v. Horde*, 2 Sm. L. C. at pp. 679 *et seq.* (11th ed.), where most of the authorities are collected.

(*u*) *Day v. Day*, *ubi sup.*

(*x*) *Ante*, p. 2.

(*y*) *Doe v. Carter*, 9 Q. B. 863.

(*z*) See *ante*, p. 597.

(*a*) *Jarman v. Hale*, [1899] 1 Q. B. 994.

(*b*) *Day v. Day*, L. R. 3 P. C. at p. 763.

agreement for a new tenancy must be made with a knowledge of the determination of the former, and with an intention to create a fresh tenancy; but it seems doubtful whether anything more is required than a definite acknowledgment from the tenant that he is holding by permission of the landlord (*c*).

The mere fact that the land (as in the case of a railway company's land required for the purposes of their undertaking and not superfluous land (*d*)) is by statute inalienable (*e*), or only alienable with certain consents which have not been obtained (*f*), will not prevent the operation of the statute. But the 7th section of the statute does not apply to the case of a mere licensee, who has no exclusive occupation (*g*), and whose possession is in law that of the person with whose licence he occupies (*h*). Where, for instance, the owner of a house allowed it to be occupied by members of his family, but continued to pay the taxes and to execute necessary repairs, it was held that on the facts the proper inference was that the occupation was in the character not of tenants but of mere guests, and that the statute did not run against him (*i*). Nor does the enactment extend to the case of an encroachment (*k*) by a tenant, even if made with the assent of his landlord, so as to prevent the operation of the ordinary rule that it is to be treated as part of the demised premises, and consequently governed by the same principle of limitation as applies to them (*l*).

The 7th section is qualified by a proviso to the effect that no mortgagor or *cestui que trust* shall within its meaning be deemed a tenant at will to his mortgagee or trustee. And though this proviso has been said to apply only to the case of an express trust (*m*), it seems that it does apply to an implied trust, such as that created by occupation of premises under an agreement of lease or purchase with their owner (*n*). Thus, the lessee of land under a building agreement is not a tenant at will to the lessors so

(*c*) *Jarman v. Hale*, *supra*, per Channell, J. It seems clear that in *Turner v. Doe*, *supra* (a decision of the Ex. Ch.), there was no such knowledge or intention.

(*d*) 8 & 9 Vict. c. 18, s. 127; see *Mulliner v. Mid. Ry. Co.*, 11 Ch. D. 611.

(*e*) *Bobbett v. S. E. Ry. Co.*, 9 Q. B. D. 424.

(*f*) *Mayor of Brighton v. Guardians of Brighton*, 5 C. P. D. 368; *Wimbledon Conservators v. Nicol*, *supra*.

(*g*) *Anie*, p. 7.

(*h*) *Bobbett v. S. E. Ry. Co.*, *supra*; *Allen v. England*, 3 F. & F. 49.

(*i*) *Peakin v. Peakin*, [1895] 2 I. R. 359.

(*k*) As to this, see *post*, p. 755.

(*l*) *Whitmore v. Humphries*, L. R. 7 C. P. 1.

(*m*) *Doe v. Rock*, Car. & M. 549; 4 M. & Gr. 30; *Sands to Thompson*, 22 Ch. D. 614, per Fry, J.

(*n*) Per Kay, L. J., in *Warren v. Murray*, *infra*.

as to preclude the latter from recovering at the end of the term those portions of the land in respect of which no leases have been granted, in spite of the lapse of the statutory period of possession without payment of rent (*o*). The entire exclusion of the statute, however, in cases of this kind is also capable of being put on the ground that at no time during the running of the agreement could the lessors have enforced the right to possession at all, inasmuch as formerly a Court of equity, and now every Court, would have had jurisdiction to restrain their proceedings by injunction (*p*). The proviso, moreover, applies not merely as regards land of which a trustee is in fact trustee for the *cestui que trust*, but also as regards land the possession of which is obtained by reason of the trust (*q*).

An acknowledgment in writing of title, given to the person entitled, or his agent, signed by the person in possession or in receipt of the profits of the land, saves the operation of the statute, causing it to run only from the time such acknowledgment is given (*r*). An acknowledgment, however, made after the statute has once run cannot save its operation, for it cannot restore a title which, as already seen, the statute has extinguished (*s*). No particular form of document is necessary: any admission from which a recognition of the title of the person to whom it is made may be inferred will be sufficient (*t*). An acknowledgment, however, by an agent will not satisfy the section (*u*). Its operation is none the less valid because it has been given under compulsion, *e.g.*, where it is contained in an answer in Chancery proceedings, provided that it complies with the statute by being given to the person entitled (*x*); but an acknowledgment on the face of it made with a view to an arrangement which has not been carried out is not sufficient (*y*). The question of its effect, like that of the construction of written documents in general, is one for the Court (*y*).

Periodic tenancies (*z*) not created by lease in writing.—By 3 & 4 Will. 4, c. 27, s. 8, the right of the person entitled, subject to a tenancy, in possession or by receipt of rent or profits (*a*), from year to year or other period (without any lease in writing), to make an entry or distress, or bring an action to recover the land, shall be

(*o*) *Drummond v. Sant*, L. R. 6 Q. B. 763.

(*p*) *Warren v. Murray*, [1894] 2 Q. B. 648.

(*q*) *East Stonehouse Urban Council v. Willoughby*, [1902] 2 K. B. 318.

(*r*) 3 & 4 Will. 4, c. 27, s. 14.

(*s*) *Sanders v. Sanders*, 19 Ch. Div. 373.

(*t*) *Fursdon v. Clogg*, 10 M. & W. 572.

(*u*) *Ley v. Peter*, 3 H. & N. 101.

(*x*) *Goode v. Job*, 1 E. & E. 6.

(*y*) *Doe v. Edmonds*, 6 M. & W. 295.

(*s*) See *ante*, p. 3.

(*a*) See s. 35, cited *infra*, p. 685.

deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen). The word *rent*, where last employed, clearly does not, as it does in the earlier part of the section, mean rent-charge (*b*), but the rent reserved in the ordinary way upon the tenancy (*c*). It follows from what has already been mentioned (*d*), that (subject to what is presently stated (*e*) as to the effect of a change in the reversion (*f*)) a tenant from year to year will acquire an indefeasible title to the premises he occupies after twelve years have elapsed from his last payment of rent, or if he have never paid rent then after thirteen years from the commencement of the tenancy. And when the right of the lessor to the land thus becomes extinguished, all his rights as reversioner—including that of recovering rent—are extinguished also (*g*). Where there has been payment the statute runs afresh from the time it is made, even (as it seems) where made after the statute has once run (*h*).

The section here treated of, as will be noticed, does not apply where the tenancy is created by a lease in writing; but to exclude it there must be an instrument in writing capable of passing an interest and so operating as a lease (*i*). A tenancy from year to year, for instance, created by entry and payment of rent (*k*) under a lease in writing, but void by reason of the provisions of mortmain, is within it (*l*). The payment of rent which suspends its operation need not be in money (*m*), but payments (in money) of something not strictly the rent of the land of which the person making them was tenant will not be sufficient (*n*). A verbal admission of payment by the occupier is evidence, as against any person subsequently claiming under him, of the fact that the rent has been paid so as to prevent the operation of the section (*o*). Where the tenancy from year to year or other period is one not actually in possession, but by virtue of the receipt of rent from a

(b) See *Grant v. Ellis*, 9 M. & W. 113, cited *ante*, p. 172.

(c) *Baines v. Lumley*, 16 W. R. 674.

(d) *Supra*, pp. 677, 678.

(e) *Infra*, p. 682.

(f) *In re Earl of Devon's Settled Estates*, [1896] 2 Ch. 562.

(g) *In re Jolly*, [1900] 2 Ch. 616.

(h) *Bunting v. Sargent*, 13 Ch. D. 330. In the case of acknowledgments the rule, as has just been seen, is different, though the reason why the principle on which that rule is founded should not apply

here also is not perhaps obvious. And see the above statement of the law criticized in Darby and Boesauquet on the Stat. of Limitations (2nd ed.), p. 362.

(i) *Doe v. Gower*, 17 Q. B. 589.

(k) See *ante*, p. 11.

(l) *Bunting v. Sargent*, *supra*.

(m) *Doe v. Benham*, 7 Q. B. 976, cited *ante*, p. 115.

(n) *Att.-Gen. v. Stephens*, 6 D. M. & G. at p. 146.

(o) *Doe v. Beckett*, 4 Q. B. 601.

tenant in possession, such receipt, in order to exclude the true owner, must be by a person claiming wrongfully, and not receiving or claiming to receive on behalf of the true owner (*p*).

The operation of an acknowledgment to save the statute is the same as in the case last discussed (*q*).

Tenancies for a term of years (*r*).—Generally, the right of the person entitled, subject to a tenancy in possession or by receipt of rent or profits (*s*), to make an entry or distress, or bring an action to recover the land, *prima facie* accrues only from the time at which his estate or interest becomes an estate or interest in possession (*t*) (i.e., from the determination of the lease (*u*)), and endures for a period of twelve years from that time (*x*), at the expiration of which twelve years the tenant's title to the land becomes indefeasible (*y*). But a reversioner, on succeeding to an estate in a case where time has begun to run and is running, has only the residue of the period which would have barred his predecessor, or a fresh period of six years, whichever period is the longer; whilst if any reversioner is barred, the bar extends to any subsequent reversioner who claims under any instrument executed or taking effect after the original dispossession commenced (*z*). This latter part, however, of the statutory provision here considered—unlike the earlier, which clearly does relate to a landlord coming into possession on the expiration of a term of years (*a*)—does not apply to the mere reversion itself expectant on the determination of the term, but only to future estates created by the reversioner (*b*).

Where, however, during the continuance of the lease, another lease is granted by and to the same parties, so that the first is surrendered by operation of law (*c*), time does not begin to run from the new grant, although the reversioner's estate is for the moment one in possession (*d*). But this does not apply as against a mere

(*p*) *Lyell v. Kennedy*, 14 App. Ca. 437. As to "claiming wrongfully," see *infra*, p. 684.

(*q*) *Supra*, p. 680.

(*r*) As to the effect of the statute as between landlord, tenant, and tenant's mortgagee, see *Tichborne v. Weir*, 67 L. T. 735, cited *ante*, p. 416.

(*s*) See s. 35, cited *infra*, p. 685.

(*t*) 3 & 4 Will. 4, c. 27, s. 3; 37 & 38 Vict. c. 57, s. 2.

(*u*) *Doe v. Ozenham*, 7 M. & W. 131; *Chadwick v. Broadwood*, 3 Beav. 308.

(*x*) 37 & 38 Vict. c. 57, s. 1.

(*y*) 3 & 4 Will. 4, c. 27, s. 34; cf.

supra, p. 681. As to acknowledgments, see p. 680, *supra*.

(*a*) 37 & 38 Vict. c. 57, s. 2; 2 Sm. L. C. at p. 672, notes to *Nepean v. Doe*, and *Taylor v. Horde*; *In re Earl of Devon's Settled Estates*, [1896] 2 Ch. 562.

(*b*) Per Channell, J., in next-cited case.

(*c*) *Walter v. Yalden*, [1902] 2 K. B. 304.

(*d*) *Ante*, p. 634.

(*e*) *Corpus Christi College v. Rogers*, 49 L. J. Q. B. 4, as explained in next-cited case.

trespasser: for as against him the reversioner becomes entitled to an estate in possession as soon as he becomes entitled to such estate as against the lessee, *i.e.*, upon the determination of the lease by its surrender (*e*). (In the case, however, where a lessee surrenders his lease *after* a trespasser has, as against him, acquired a title by lapse of time, the lessor cannot of course acquire by the surrender a right of entry which the lessee has not got, and consequently the statute does not, as against him, begin to run until the expiration of the term for which the lease has been granted (*f*).) But it applies as against an underlessee (*e.g.*, a tenant from year to year) whose interest is still undetermined and whose possession as against the reversioner is consequently rightful; for upon a surrender and renewal he holds, as has already been seen (*g*), as if the original lease out of which his sub-interest was derived had been still continued and kept on foot (*h*). (And it also applies as against a party in possession under the trusts of a settlement where such possession, though not in fact conferred by the trust, is obtained by reason of the possession of the trust property (*i*).) Hence the surrender of a lease for its renewal operates, where an underlessee is in occupation, to defer the bar of the statute as against the reversioner until the determination of the renewed lease. Where, for instance, lessees for lives sub-leased for a term of years determinable on the dropping of the last of such lives, and afterwards surrendered their lease and renewed it for other lives, it was held that, though they could themselves have recovered possession as against the underlessee at the dropping of the last of the original lives, it was not the effect of the statute last cited to enable the reversioner to recover possession as against the underlessee before the dropping of the last of the substituted lives (*k*).

It makes no difference to the application of the general rule that the lease is voidable by reason of forfeiture or breach of condition (*l*), where the forfeiture, though actually incurred by the lessee, has not been taken advantage of by the reversioner (*m*). In the case, however, of a lease voidable by statute (though the

(*e*) *Eccles. Commissioners v. Rowe*, 5 App. Ca. 736, per Lord Selborne, L. C., who seems, however, to connect the last-cited case with sect. 8, though that section, as already seen, does not apply to leases in writing.

(*f*) *Walter v. Yalden*, *supra*.

(*g*) 4 Geo. 2, c. 28, s. 6; *ante*, p. 643.

(*h*) *Ecclesiastical Commissioners v. Rowe*, *ubi sup*.

(*i*) *East Stonehouse Urban Council v. Willoughby*, [1902] 2 K. B. 818, cited *supra*, p. 680.

(*k*) *Ecclesiastical Commissioners v. Tremer*, [1893] 1 Ch. 166.

(*l*) See pp. 816, 651, *ante*.

(*m*) 3 & 4 Will. 4, c. 27, ss. 3, 4; *Astley v. Lord Essex*, L. R. 18 Eq. 290, and (before the statute) *Doe v. Blakeway*, 5 C. & P. 563; see *ante*, p. 323.

matter was expressly treated as being on the same footing as that of a lease voidable by forfeiture (*n*), the law has been said to be different (*o*). But if the lease granted be altogether void, time will begin to run from the date of its commencement, and not from that of its determination (*p*).

Where, however, in the case of a tenancy for years, the following conditions are fulfilled—lease in writing (*q*), rent reserved thereon amounting to 20*s.* yearly at the least (*r*), and *such rent paid to a person claiming adversely* (*s*),—the case no longer falls within the general rule (*t*), but is specially provided for by 3 & 4 Will. 4, c. 27, s. 9. This section enacts that the right of the person entitled, subject to a lease of this character, in possession or by receipt of rent or profits (*u*), to make an entry or distress, or bring an action to recover the land, shall, when the rent reserved by the lease has been received by some other person wrongfully claiming to be entitled to the reversion, and no payment of such rent has afterwards been made to the person rightfully entitled thereto, be deemed to have first accrued at the time such rent was received by the person so wrongfully claiming, and not upon the determination of the lease (*x*).

A person claims "wrongfully" within the meaning of this section who claims without real title, *e.g.*, where his claim is put forward under a mistake: it is not necessary that the claim should be otherwise improper (*y*). But the payment to him made by the tenant must be one strictly of rent as such (*z*), a mere attornment to him not being sufficient (*a*), and such rent must have been received by a person under a wrongful claim of title, and not by one receiving or claiming to receive it under the true owner (*b*). Where the reversion upon a lease was severed by the conveyance of a small portion of the land out of which the rent issued, and, instead of the rent being legally apportioned and an apportioned

(*n*) *Magdalen Hospital v. Knotts*, 8 Ch. D. at p. 727.

(*o*) *Id.*, 8 Ch. Div. 709, where, however, the 4th section of 3 & 4 Will. 4, c. 27, does not appear to have been referred to. See next note.

(*p*) *Id.*, 4 App. Ca. 324 (affirming C. A., but on a wholly different ground); *Webster v. Southey*, 36 Ch. D. 9.

(*q*) Even, as it seems, in a tenancy from year to year, as sect. 8 (*supra*, p. 680) applies only to oral demises.

(*r*) On the reason of this condition, see 2 Sm. L. C. 690-1.

(*s*) *Chadwick v. Broadwood*, 3 Bear. 308.

(*t*) *Supra*, p. 682.

(*u*) See s. 35, cited *infra*.

(*x*) The section will be found fully expounded in *Doe v. Angell*, 9 Q. B. 323. As to acknowledgments, see p. 680, *supra*.

(*y*) *Williams v. Pott*, L. R. 12 Eq. 149.

(*z*) *Doe v. Gopsall*, 4 Q. B. 603, n.

(*a*) *Archbold v. Scully*, 9 H. L. C. 360, per Lord Wensleydale.

(*b*) *Lyell v. Kennedy*, 14 App. Ca. 437, per Lord Selborne.

share being paid to the purchaser in respect of his part, the whole rent continued to be paid as before to the owner of the other part, it was held that such payment was not within the section, and that consequently the purchaser's title was not extinguished, though he had received no rent from the lessee for more than twelve years (c).

It will be noticed that in this particular case (d), unlike that of tenancies dealt with by the other sections of the statute, the tenant can never acquire a right against his own landlord; for at the end of the prescribed time of limitation the right is acquired, not by him, but by the person to whom he pays the rent (e), and it is provided (f) that "the receipt of the rent payable by any tenant from year to year or other lessee shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this Act."

(c) *Laybourn v. Gridley*, 61 L. J. Ch. 352.

(e) 2 Sm. L. C. 689.

(d) Under sect. 9.

(f) Sect. 35.

Part II.

DETERMINATION OF THE RELATIONSHIP

(continued).

Book IV.

INCIDENTS OF DETERMINATION.

WHEN the relationship of landlord and tenant determines in accordance with one of the modes which have already been explained, the tenant acquires certain rights, and is subject to certain duties, correlative duties and rights being respectively imposed on and vested in the landlord. These rights and duties incident to the determination of the tenancy it is now proposed to examine in detail.

(A) *Rights and remedies of the Tenant.*

These may be considered under the following heads:—(1) *Fixtures* in tenancies generally; (2) *Emblements*, and (3) *Tenant-right* (both at common law and by statute), in tenancies of an agricultural nature. In addition, too, to these, it may be stated that leases of premises used for purposes of trade (*e.g.*, of public-houses) sometimes contain a covenant binding the landlord to allow the tenant at the expiration of his term a certain sum for the goodwill of the business; and when this is the case regard must be had, in estimating the amount, to any improvement which may have taken place in the condition of the neighbourhood (a). In many leases the rights of the tenant here considered

(a) *Llewellyn v. Butherford*, L. R. 10 C. P. 456.

are expressed to take effect at the expiration "or other sooner determination" of the term: but, as already stated, these words do not, as it has been held, apply once the term has been surrendered, because those rights are thereby put an end to (*b*).

It may be mentioned here that the property in the lease itself continues in the lessee upon the expiration of the term as during its continuance (*c*), and this even if the lessor has re-entered for a forfeiture (*d*).

In the case of agricultural tenancies (*e*), further rights of importance have now, as from the 1st of January, 1909 (*f*), been conferred upon tenants at the determination of their holding, in the form of compensation payable to them in the event of what has been called "unreasonable disturbance" of their possession. The Agricultural Holdings Act, 1906 (*g*), provides as follows (*h*):— "Where the landlord, without good and sufficient cause, and for reasons inconsistent with good estate management, terminates a tenancy by notice to quit, or, after having been requested in writing, at least one year before the expiration of a tenancy, to grant a renewal thereof, refuses to do so (*i*), or where it has been proved that an increase of rent is demanded from the tenant, and that such increase was demanded by reason of an increase in the value of the holding due to improvements which have been executed by or at the cost of the tenant, and for which he has not either directly or indirectly received an equivalent from the landlord, and such demand results in the tenant quitting the holding, the tenant upon quitting the holding shall, in addition to the compensation (if any) to which he may be entitled in respect of

(*b*) See *ante*, p. 643.

(*c*) *Hall v. Ball*, 3 M. & Gr. 242. See *Knight v. Williams*, [1901] 1 Ch. 256; cited *ante*, p. 637.

(*d*) *Elworthy v. Sandford*, 3 H. & C. 330.

(*e*) As to the tenancies here spoken of, see *post*, p. 728.

(*f*) Sect. 9 of next-cited Act. The statute, as will be seen, deals with three different things, all of them acts on the part of the landlord,—the giving of notice to quit, refusal to renew the

tenancy, and demand of increased rent; and it is thought that all of them must have been done after this date, and that a notice to quit given before it, though not actually expiring until afterwards, is not within the section.

(*g*) 6 Edw. 7, c. 56.

(*h*) Sect. 4.

(*i*) It is thought that this means a renewal for a term of the same length and subject to the same conditions as the previous one. See *Lewis v. Stephenson*, 67 L. J. Q. B. 296, cited *ante*, p. 306.

improvements (*k*), and notwithstanding any agreement to the contrary, be entitled to compensation for the loss or expense directly attributable to his quitting the holding which the tenant may unavoidably incur upon or in connection with the sale or removal of his household goods, or his implements of husbandry, produce, or farm stock on or used in connection with the holding.

"Provided that no compensation under this section shall be payable (a) unless the tenant has given to the landlord a reasonable opportunity of making a valuation of such goods, implements, produce, and stock as aforesaid; or (b) unless the tenant has within two months after he has received notice to quit or a refusal to grant a renewal of the tenancy, as the case may be, given to the landlord notice in writing of his intention to claim compensation under this section; or (c) where the tenant with whom a contract of tenancy was made has died within three months before the date of the notice to quit, or in the case of a lease for years before the refusal to grant a renewal; or (d) if the claim for compensation is not made within three months after the time at which the tenant quits the holding.

"In the event of any difference arising as to any matter under this section, the difference shall, in default of agreement, be settled by arbitration (*l*)."

(B) *Rights and remedies of the Landlord.*

Some of the obligations which the tenant, under special covenants, may have undertaken to discharge upon the determination of his tenancy, have already been sufficiently noticed (*m*). It may be added that where power given to a tenant to "break" a lease for years (*n*) is exercised by him, the mere fact that the lease contains no express reservation of the landlord's rights in respect of existing breaches of covenant by the tenant will not

(*k*) See *post*, pp. 726 *et seq.*

(*l*) By s. 1 (2) the procedure must be that of arbitration before a single arbitrator under the provisions of Part I. of the 2nd sched. of the Agr. H. Act, 1900. See *post*, pp. 734 *et seq.*

(*m*) See, *e.g.*, under *Covenant to repair*,

ante, pp. 216 *et seq.* It need scarcely be said (compare a similar result in the case of forfeiture: *ante*, p. 653) that the acceptance by the landlord of rent due upon the determination of the tenancy is no waiver of his rights upon such obligations.

(*n*) See *ante*, pp. 111, 601.

absolve the latter from liability as to such breaches; nor does the presence in the lease of an express proviso declaring that upon the exercise of the option the lease and all its contents (notwithstanding anything it may contain to the contrary) shall become void make any difference (*o*).

Beyond the obligations just adverted to, the tenant's duty upon the determination of his term is to yield up complete possession of the demised premises to the landlord (*p*). He has to give up the subject demised in its entirety, and it is a general rule that he cannot, by use and enjoyment, acquire an easement in it distinct from the use and enjoyment of the land, as against his landlord (*q*). At that time, too, any enjoyment he may have had, as for instance of a watercourse,—not merely by virtue of rights created by the lease itself, but also *under colour of the lease, i.e.*, under a belief common to both parties that it was had under the lease—comes to an end (*r*).

If the tenant fail to give complete possession, the landlord has—in addition to his power to recover for any damage he may have suffered by such default (*p*)—four courses which he may follow. These are:—(1) Recognition of tenancy as continuing. (2) Action for double value or (where the determination of the tenancy has resulted from a notice to quit given by the tenant) recovery of double rent. (3) Re-entry without legal process. (4) Proceedings in ejectment. The action for double *value*, as will be seen hereafter (*s*), is not inconsistent with a decision on the part of the landlord to treat the tenancy as at an end; but, subject to this observation, it may be said that by the first two courses he retains his tenant, and by the last two he gets rid of him.

These matters will be considered in their order.

(*o*) *Blore v. Giuliani*, [1903] 1 K. B. 356. Cf. *ante*, pp. 642, 650.

(*p*) See *post*, pp. 754—757.

(*q*) *Outram v. Maule*, 17 Ch. D. 391; *Gayford v. Moffatt*, L. R. 4 Ch. 133; *Kilgour v. Gaddes*, [1904] 1 K. B. 457; *Macnaghten v. Baird*, [1903] 2 I. R. 731; Gale on Easements, p. 203 (7th ed.). It may be noticed that light stands on a different footing to other easements in that a right to its enjoyment can, under

the terms of the Prescription Act (2 & 3 Will. 4, c. 71), s. 3, be acquired by a tenant against his landlord (*Fear v. Morgan*, [1906] 2 Ch. 406; *affd.*, H. L., *Morgan v. Fear*, W. N. 1907, p. 196); but at the end of the term the right would of course be lost by the surrender of the dominant tenement.

(*r*) *Chamber Colliery Co. v. Hopwood*, 32 Ch. Div. 549.

(*s*) *Post*, p. 769.

CHAPTER I.

RIGHTS AND REMEDIES OF THE TENANT.

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Div. I.—FIXTURES.

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As between landlord and tenant the important question with regard to fixtures (a question which nearly always arises at the determination of the tenancy) is whether articles in the nature of fixtures can be removed by the tenant or not. The right of severance in any case—apart of course from that where they are the special subject of agreement or purchase—only arises when the article has been affixed by the tenant himself, and not when, it having been affixed and left by a previous tenant (or even by the tenant himself during a previous demise (*a*)), it is a part of that which has been demised to his successor (*b*).

Speaking generally, articles in the nature of fixtures can be removed in the following cases:—

A. Where the article, though annexed to the land, has not been

(a) See p. 709, *infra*.

(b) *Ex parte Willoughby*, 44 L. T. 781.

so annexed as (in a legal sense) to become part of the freehold. An article of this kind is not properly a "fixture" at all: for though that word has been used in various meanings (*c*), its legitimate application is only to chattels which have been united with the realty in such a way as (but for the rule permitting removal) to become part of it (*d*).

B. Where the article has been annexed to the land (so as to become part of it) for purposes of (1) trade, (2) agriculture, (3) ornament and convenience.

C. Where the article, having been annexed to (and become part of) the land, is subject to a special stipulation in favour of the tenant (*e*). (This is frequently the case in leases of mills, collieries, &c.; but in ordinary leases such special stipulations, which of course override the common law, are usually introduced in favour of the landlord.)

The whole subject may therefore be treated as follows:—

- I. Articles which are not really fixtures at all because not part of the land, either (1) from not being attached to the land at all, or (2) from the annexation being incomplete;
- II. Articles which, though really fixtures, are as between landlord and tenant removable by the latter, as having been annexed by him for purposes of (1) trade, (2) agriculture, (3) ornament and convenience;
- III. Articles which, with regard to their removability, are governed by special stipulations made between the parties;

some additional observations—with reference chiefly to the time for removing fixtures and to the remedies which may be pursued in respect of them—being appended.

I. Where the article, though annexed to the land, has not become part of it, two classes of cases may be distinguished:—

- (1.) Where the article is not attached at all.
- (2.) Where it is attached but the annexation is incomplete.

(*c*) See per Parke, B., in *Sheen v. Rickie*, 5 M. & W. 175.

(*d*) Wharton's Law Dict. s. v. See as to this Amos & Ferard on Fixtures, p. 2 (3rd ed.).

(*e*) See, e.g., *Sladdon v. Cruikshank*, 16 M. & W. 71; *Moss v. James*, 38 L. T. 595; *Rolleston v. New*, 4 K. & J. 640.

(1.) **Where the article is not attached at all.**—To make an article a fixture mere juxtaposition with the soil is not sufficient, unless an intention be shown to that effect (*f*), as where a statue resting on the ground by its mere weight forms part of one architectural design with the building of which it is an ornament (*g*): the burden of showing such an intention resting on those who assert the article to have become a fixture (*h*). Thus articles like a wooden windmill (*i*), a granary (*k*), a cistern (*l*), a wooden barn (*m*) or stable (*n*), a vat (*o*),—resting by their own weight on the ground, or (what comes to the same thing) on a foundation or supports fixed in the ground, are not fixtures (*p*); and this even if they be placed in a receptacle, or on a foundation connected with and attached to the soil and specially prepared for the purpose (*q*). Nor does it necessarily make any difference that an article so resting on the ground subsequently sinks into the ground either by its own weight (*r*) or by a weight placed upon it (*s*): the question whether it becomes a fixture or not being one of fact depending on the intention of the parties (*t*).

There are, however, certain cases where articles, though not attached to the soil, are deemed to be fixtures by virtue of what has been called a "constructive" annexation (*u*). The locks, keys, windows, and doors, for instance, of a house are always regarded as part of the realty, though they may be distinct and separate from it (*x*); and so is a millstone with regard to the mill, even though actually removed for a temporary purpose (*y*). And where an article though not attached (or capable of being easily detached) forms, with another article which is attached to the soil, a complete chattel (*e.g.*, a machine), it will itself be a fixture (*z*) if it be an

(*f*) *Holland v. Hodgson*, L. R. 7 C. P. 328, per Blackburn, J., at p. 335; *Monti v. Barnes*, [1901] 1 K. B. 205.

(*g*) *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382; *Bulkeley v. Lyne Stephens*, 11 T. L. R. 564. Cp. with these cases (on the point of architectural design) *Hill (Lord) v. Bullock*, [1897] 2 Ch. 482.

(*h*) *Holland v. Hodgson*, *supra*.

(*i*) *B. v. Otley*, 1 B. & Ad. 161; *R. v. Londonthorpe*, 6 T. R. 377; *Steward v. Lombe*, 1 B. & B. 506.

(*k*) *Wiltshier v. Cottrell*, 1 E. & B. 674.

(*l*) *Mather v. Fraser*, 2 K. & J. 536.

(*m*) *Wansbrough v. Maton*, 4 A. & E. 884; *Culling v. Tuffnal*, Bull. N. P. 34.

(*n*) *Fitzherbert v. Shaw*, 1 H. Bl. 258, per Gould, J.

(*o*) *Horn v. Baker*, 9 East, 215.

(*p*) See *Metropolitan Counties, &c., Society v. Brown*, 26 Beav. 454.

(*q*) *Ex parte Asbury*, L. R. 4 Ch. 630; *Hutchinson v. Kay*, 23 Beav. 413; *In re De Falbe*, W. N. 1901, p. 87.

(*r*) See *Wood v. Hewett*, 8 Q. B. 913, per Lord Denman, C. J.; *In re De Falbe*, *supra*.

(*s*) *Beaufort (Duke of) v. Bates*, 3 D. F. & J. at p. 390, per Turner, L. J.

(*t*) *Huntley v. Russell*, 13 Q. B. at p. 577, per Parke, B.

(*u*) *Amos & F.* 20; notes to *Evans v. Maw*, 2 Sm. L. C. at p. 207 (11th ed.).

(*x*) *Shep. Touch.* 90; *Bishop v. Elliott*, 11 Exch. at p. 119.

(*y*) See *Place v. Fagg*, 4 M. & Ry. 277; *Martyr v. Bradley*, 9 Bing. 24, cited *infra*, p. 706.

(*z*) *Fisher v. Dixon*, 12 Cl. & F. 312.

essential part of the whole (*a*); and this even applies to duplicate parts of a machine unless they are in an incomplete state and have never been used in the machine (*b*). In the same way, where an article in itself easily detached is necessary to the enjoyment of another which is a fixture and which is of no practical use when separated from the former, such former article is also regarded as a fixture, *e.g.*, a gaselier with regard to gas-pipes (*c*). These cases, however, fall more properly under the next head.

(2.) **Where the article is attached but the annexation is incomplete.**—Where an article is attached to the soil and so *primâ facie* a fixture (*d*), the inference that it has become part of the freehold may be displaced by showing that the annexation is incomplete:—either from its *mode*, *i.e.*, by showing that the article can be removed *intégrè, salcè, et commodè* without injury to itself or to that to which it is annexed (*e*): or from its *object*, *i.e.*, by showing that the article was annexed, not for the permanent and substantial improvement of the land, but merely for a temporary purpose and for its more complete enjoyment as a chattel (*f*). But such purpose must be strictly temporary in order to prevent the annexation from being regarded as complete (*g*): *e.g.*, where a carpet is attached to the floor of a room by nails to keep it stretched (*h*), or where a picture is hung on a wall in order to be more conveniently seen (*i*). If the primary intention for instance (as in most cases) is that the article should remain affixed in its place while the tenant's interest in the premises endures (*k*), the case is not within the exception and the article is really a fixture (*l*); nor does the

(*a*) *Mather v. Fraser*, 2 K. & J. 536; *Metropolitan Counties, &c., Society v. Brown*, 26 Beav. at p. 459; *Ex parte Astbury*, L. R. 4 Ch. 630. (*Davis v. Jones*, 2 B. & A. 165, *senb. cont.*)

(*b*) *Ex parte Astbury*, *supra*.

(*c*) *Sewell v. Angerstein*, 18 L. T. 300. In *Smith v. Maclure*, 32 W. R. 459, a gaselier was held to be a fixture on the ground that it was substantially part of the house, and could not be removed without depriving the building of what was intended to be used with it.

(*d*) *Holland v. Hodgson*, L. R. 7 C. P. at p. 335; *Wilde v. Waters*, 16 C. B. 637.

(*e*) The mode of annexation is only one of the circumstances of the case, and not always the most important, and its relative importance is probably not

what it was in ruder or simpler times: per Lord Macnaghten, in *Leigh v. Taylor*, [1902] A. C. 157.

(*f*) *Hellawell v. Eastwood*, 6 Exch. at p. 312, per Parke, B. Cp. *Chamberlayne v. Collins*, 70 L. T. 217.

(*g*) *Mather v. Fraser*, 2 K. & J. 536; *Longbottom v. Berry*, L. R. 5 Q. B. 123; *Cross v. Barnes*, 46 L. J. Q. B. 479; *Sheffield Building Society v. Harrison*, 15 Q. B. Div. 358.

(*h*) *Hellawell v. Eastwood*, 6 Exch. at p. 313, per Parke, B.

(*i*) Per Willes, J., *Climie v. Wood*, L. R. 4 Ex. 328.

(*k*) See, *e.g.*, *Lyde v. Russell*, 1 B. & Ad. 394.

(*l*) *Holland v. Hodgson*, L. R. 7 C. P. at pp. 336-7.

mere fact that circumstances might arise rendering it desirable to transport it elsewhere during the term make any difference (*m*). And if the purpose of annexation be a permanent one, the fact that its object is only to keep the article steady when in use, and that the article can be removed without injury to itself or to the freehold, will not in itself make it the less a fixture (*n*).

In determining whether or not a chattel has become a fixture the question of intention is thus seen to be important. The intention of the person affixing it, however, is material only so far as it can be gathered from the mode and object of the annexation which are patent for all to see, but not so far as it is to be gathered from other circumstances, *e.g.*, an agreement existing between the owner and hirer of a chattel under which the right of removal shall, as between themselves, remain vested in the former (*o*).

The consideration whether the article is essential to the enjoyment of the premises on the one hand (*p*), or whether it is a mere convenience on the other (*q*), is a material element in deciding the character of the annexation as being complete or incomplete respectively; and so (for the latter inference) is the consideration whether a trade usage can be shown according to which the article is bought and sold separate and complete in itself (*r*). But inasmuch as the whole question is in each case one of fact depending on its own circumstances (*s*), the decision in one case can seldom be a guide to a solution in another.

The subjoined authorities—classed, with reference to the general rule above given, according to the feature in each case upon which the decision was principally founded—may, however, be referred to by way of illustration:—

Annexation deemed complete:—(*a*) from its *mode*, as having rendered the article not easily removable (*t*); (*b*) from its *object*, as being made for a permanent purpose (*u*), *i.e.*, with a view to the

(*m*) *Boyd v. Shorrock*, L. R. 5 Eq. 72, per Wood, V.-C. (The actual decision in this case has been dissented from: *Hawtry v. Bullin*, L. R. 8 Q. B. 290; *Ex parte Daglish*, L. R. 8 Ch. 1072.)

(*n*) *Longbottom v. Berry*, *supra*; *Sheffield Building Society v. Harrison*, *supra*.

(*o*) *Hobson v. Gorringe*, [1897] 1 Ch. 182; *Reynolds v. Ashby*, [1903] 1 K. B. 87; *affd.*, H. L., [1904] A. C. 466.

(*p*) *R. v. Lee*, L. R. 1 Q. B. 241; *Turner v. Cameron*, L. R. 5 Q. B. 306

(reported as *Turnor v. Cameron*, 22 L. T. 525).

(*q*) *Parsons v. Hind*, 14 W. R. 860.

(*r*) See *Trappes v. Harter*, 2 Cr. & M. at p. 180; *Chidley v. West Ham*, 33 L. T. 486. As to this latter case, however, see *Reynolds v. Ashby*, *supra*.

(*s*) *Hellawell v. Eastwood*, 6 Exch. at p. 312; *Monti v. Barnes*, 17 T. L. R. 88.

(*t*) *Turner (or Turnor) v. Cameron*, *supra*; *Hobson v. Gorringe*, *supra*.

(*u*) *Clitmis v. Wood*, L. R. 4 Ex. 328. per Willes, J., and cases *supra*, note (*g*).

beneficial user of the land (*x*), or (as it is sometimes called) to the "improvement of the inheritance" (*y*).

Annexation deemed incomplete.—(a) from its *mode*, as having rendered the article easily removable (*z*); (b) from its *object*, as being made for a mere temporary purpose, *i.e.*, with a view to the better enjoyment of the article as a chattel (*a*).

It has been said that in order that an article may become a fixture by the annexation being complete, the fastening which attaches it to the soil must be one designed for the purpose of so attaching it and not for any other object (*b*). The decision that a machine, for instance, resting on the ground by its own weight, and merely attached to the freehold by pipes erected for the purpose of conveying water to it, is not a fixture, may perhaps be put on this ground (*c*).

II. Where an article is really a fixture from its having been annexed in such a manner as to become part of the freehold, the maxim *quicquid plantatur solo solo cedit* applies (*d*), and it becomes *primâ facie* irremovable.

The next class of articles, however, to be considered are those which, though really fixtures from the annexation being complete (*e*), are in certain cases removable as between landlord and tenant by reason of the *purpose* for which such annexation has been made. There are three kinds of cases to be dealt with, *viz.* where such purpose is that of (1) trade, (2) agriculture, (3) ornament and convenience. It should be stated that several of the authorities here referred to were decided, not as between a tenant and his landlord, but as between the executor of a tenant for life and the remainderman, or as between the executor of a tenant in fee and the heir; inasmuch, however, as the privilege of removing fixtures is construed more liberally in the first class of cases (that of

(*x*) *R. v. Lee*, L. R. 1 Q. B. 241; *Fisher v. Dixon*, 12 Cl. & F. 312; *Mather v. Fraser*, 2 K. & J. 536; *Bulkeley v. Lyns Stephens*, 11 T. L. R. 564; *Monti v. Barnes*, *supra*.

(*y*) *Walmesley v. Milne*, 7 C. B. N. S. 115; *Ex parte Willoughby*, 44 L. T. 781, per Cotton, L. J.

(*z*) *Trappes v. Harter*, 2 Cr. & M. 153 (explained in *Reynolds v. Ashby*, [1904] A. C. 466); *Hutchinson v. Kay*, 23 Beav. 413; *Chidley v. West Ham*, *supra*.

(*a*) *Waterfall v. Penistone*, 6 E. & B. 876; *Parsons v. Hind*, 14 W. R. 860;

Dumergue v. Rumsey, 10 W. R. 844 (reversed on appeal, 2 H. & C. 877, on another point); *Lincolnshire Financos Co. v. Farrant*, 2 T. L. R. 248; *Lyon v. London City & Midland Bank*, [1903] 2 K. B. 135.

(*b*) *Amos & F.* 14.

(*c*) *Longbottom v. Berry*, L. R. 5 Q. B. 123 (as to the "washer"). Cf. *Chidley v. West Ham*, 32 L. T. 486, as to which, however, see note (*r*), *supra*.

(*d*) *Bain v. Brand*, 1 App. Ca. 762, per Lord Chelmsford.

(*e*) *Supra*, p. 691.

landlord and tenant) than in either of the others (*f*), it follows that decisions in favour of removability given in those latter cases will apply *à fortiori* to the rights of an ordinary tenant (*g*). It has been said that the right of removal is not an exception which enables the tenant to remove part of the freehold, but an exception by which the chattels do not become part of the freehold (*h*).

(1.) **Trade.**—The object of the relaxation *in favour of the tenant* of the general rule here is the benefit of the public by the encouragement of trade (*i*); and the principle upon which such relaxation is made has no application where the articles are affixed by persons who are themselves owners in fee of the soil (*k*). The following kinds of articles may be mentioned by way of illustration as having been deemed to be removable accordingly:—Fire engines in a colliery (*l*); salt-pans fixed to a brick floor, with furnaces under them (*m*); vats (*n*); coppers and brewing vessels (*o*); fixed steam engines and boilers (*p*); sheds formed of uprights rising from a brickwork foundation (*q*); and even a building (erected for the purpose of making varnish, and with a chimney belonging to it) on a brick foundation let into the ground (*r*). But the doctrine will not entitle a tenant to remove as a trade “fixture” any building of a permanent or substantial character which he may have erected (*s*). Nor does the mere fact that its use is only as accessory to a removable article make any difference (*t*); though where a building (*e.g.*, a shed constructed to cover machinery) has no such permanent character, the fact of its being so accessory

(*f*) *Elwes v. Maw*, 3 East, at p. 51; 2 Sm. L. C. 189; *Norton v. Dashwood*, [1896] 2 Ch. 497.

(*g*) *Amos & F.* 50. In the third class of cases (unlike the others) it is clear that the claimants are both persons deriving title under the previous owner of the property who attached the chattels (cf. at note (*k*), *infra*); so that cases of the second class are more analogous to those as between landlord and tenant than to them: *In re Hulse*, [1905] 1 Ch. 406.

(*h*) *In re Hulse*, *supra*, per Buckley, J.

(*i*) *Penton v. Robart*, 2 East, 88, per Lord Kenyon, C. J.

(*k*) *Mather v. Fraser*, 2 K. & J. 536; *Fisher v. Dixon*, 12 Cl. & F. 312; *Walmsley v. Milne*, 7 C. B. N. S. 113; *Climie v. Wood*, L. R. 4 Ex. 328.

(*l*) *Lawton v. Lawton*, 3 Atk. 13; *Dudley (Lord) v. Warde*, Amb. 113.

(*m*) *Lawton v. Salmon*, 1 H. Bl. 260, n., per Lord Mansfield, C. J.

(*n*) *Poole's case*, 1 Salk. 368, per Holt, C. J.

(*o*) *Lawton v. Lawton*, *supra*, per Lord Hardwicke, L. C.

(*p*) *Climie v. Wood*, L. R. 4 Ex. 328, per Willes, J.

(*q*) *Dean v. Allalley*, 3 Esp. 11, explained in *Elwes v. Maw*, 3 East, at p. 47. But the decision itself seems unsustainable; see p. 706, *infra*.

(*r*) *Penton v. Robart*, *supra*.

(*s*) *Whitehead v. Bennett*, 27 L. J. Ch. 474.

(*t*) *Id.*; *Wake v. Hall*, 7 Q. B. Div. at p. 301, per Lord Selborne, L. C.; *affd.*, 8 App. Ca. 195. Cf. *Ward v. Dudley (Lady)*, 57 L. T. 20.

and of its having no other existence or purpose will make it removable also (*u*).

In accordance with the above principle it has been held that trees and shrubs growing in the grounds of a nurseryman or market gardener (*x*) are removable if they have been planted by him in the way of his trade (*y*), and so form part of his stock-in-trade (*z*); and this will apply even to fruit trees in bearing, if fairly nursery trees and not of larger growth than can be dealt with in such trade (*u*). So glass-houses and other buildings of the kind erected by such persons (*b*) may be removed by them before or at the end of their term (*c*). Market gardeners are, moreover, entitled to the privileges conferred by the Agricultural Holdings Act (*d*), as extended by the compensation Act specially affecting them (*e*). How far their common law rights are affected by these enactments will be presently considered (*f*).

In order that a trade fixture may be removable, the removal must be capable of being effected without material injury to the freehold on the one hand (*g*), and without such disintegration of the chattel itself as would involve its destruction on the other (*h*). But the mere fact of its being necessary to take the chattel to pieces in order to remove it will not render it irremovable if it can be set up again in the same form elsewhere (*i*).

The existence of a local usage treating a trade fixture as removable is a material element in deciding the question whether it can be removed or not (*k*).

It may be mentioned here that the mortgage of a lease made by a lessee will carry the fixtures, though removable as being affixed

(*u*) *Whitehead v. Bennett*, *supra*, per Kindersley, V.-C.

(*x*) *Scow*, in the case of any other person: *Wyndham v. Way*, 4 Taunt. 816, per Heath, J. (fruit trees); *Empson v. Soden*, 1 B. & Ad. 655 (growing box); *Jenkins v. Gething*, 2 J. & H. at p. 525 (vines).

(*y*) *Wardell v. Usher*, 3 Scott, N. R. 508; *Penton v. Robart*, 2 East, 88, per Lord Kenyon, C. J.

(*z*) *Oakley v. Monck*, L. R. 1 Ex. at p. 167, per Blackburn, J.

(*a*) *Wardell v. Usher*, *supra*. So in *Mears v. Callender*, [1901] 2 Ch. 388 (where the trees were apparently of such larger growth), they were held to be irremovable.

(*b*) As to the removal of such erec-

tions when made by private persons, see p. 703, *infra*.

(*c*) *Mears v. Callender*, [1901] 2 Ch. 388.

(*d*) 46 & 47 Vict. c. 61, s. 54. See p. 700, *infra*.

(*e*) 58 & 59 Vict. c. 27. See sect. 6 for the interpretation of the term "market garden."

(*f*) *Infra*, p. 701.

(*g*) *Gibson v. Hammersmith Ry. Co.*, 2 Dr. & Sm. at p. 608; *Ward v. Dudley (Lady)*, 57 L. T. 20. As to the tenant's liability for damage, see p. 703, *infra*.

(*h*) *Amos & F.* 65.

(*i*) *Whitehead v. Bennett*, 27 L. J. Ch. 474.

(*k*) *Watherell v. Howells*, 1 Camp. 227; *Davis v. Jones*, 2 B. & A. 165; *Culling v. Tuffnail*, Bull. N. P. 34.

for trade purposes, and though affixed after the mortgage (*l*). And words which in a conveyance in fee by way of mortgage are sufficient to pass trade fixtures will have the same effect when the mortgage is of leasehold property by sub-demise; but in the latter case the absolute property in such fixtures as separate chattels with the right to remove and sell them will not pass to the mortgagee unless an intention to that effect is apparent in the deed (*m*). Where, however, a lease (not under the Conveyancing Act (*n*)) is made by a mortgagor after the mortgage, the tenant's right of removal will prevail against the mortgagee, the latter having permitted the mortgagor to deal with the property (*o*). So a mortgagee, by leaving the mortgagor in possession, impliedly authorizes him to bring and place on the premises fixtures necessary for his business, and to agree with their owner (in case of hiring) that he shall be at liberty to remove them at the end of the time for which they are hired (*p*); and he cannot consequently claim those fixtures against such owner, at all events if the latter removes them before the mortgagee takes possession (*q*). But this only applies where the mortgagee may be taken to have assented to the removal of the fixtures *before the taking of possession* by him (*r*), and not when such removal has taken place, not in the ordinary or legitimate course of the mortgagor's trade, but for the express purpose of preventing the mortgagee from claiming the fixtures (*s*).

So where, after fixtures had been erected by a tenant, the landlord mortgaged his reversion, and they were left on the premises by the tenant after the expiration of his term in pursuance of an agreement made by him (after the mortgage) with the landlord alone (*t*), it was held that such agreement was inoperative as against the mortgagees when once they had taken possession (*u*).

As regards articles in the nature of fixtures which are really chattels, the principle applies that a mortgagor cannot confer upon

(*l*) *Meux v. Jacobs*, L. R. 7 H. L. 481.
(*m*) *Southport Banking Co. v. Thompson*, 37 Ch. Div. 64.

(*n*) *Ante*, p. 61.

(*o*) *Sanders v. Davis*, 15 Q. B. D. 218.

(*p*) Per Lindley, L. J., in next-cited case.

(*q*) *Gough v. Wood*, [1894] 1 Q. B. 713; *Cumberland Banking Co. v. Maryport Hematite, &c., Co.*, [1892] 1 Ch. 415.

(*r*) See *Hobson v. Gorringe*, [1897] 1 Ch. 182; *Reynolds v. Ashby*, [1903] 1 K. B. 87; *affd.*, H. L., [1904] A. C. 466.

There are passages in the judgments in these two cases which suggest that the mortgagee might lose the right to the fixtures if he took his mortgage with actual notice of the hiring agreement. Nor will such right enure to a mere equitable mortgagee: *In re Allen*, [1907] 1 Ch. 575.

(*s*) *Huddersfield Banking Co. v. Lister*, [1895] 2 Ch. 273.

(*t*) See as to this, *infra*, p. 710.

(*u*) *Thomas v. Jennings*, 66 L. J. Q. B. 5.

his mortgagee a better title than he himself has to the property mortgaged ; so that a person who has hired such articles does not by a subsequent mortgage of the premises pass them to the mortgagee, even where the hiring agreement contains an option of purchase, if such option has not been exercised by him (*x*).

(2.) **Agriculture.**—The tenant's privilege of removal under this head, unlike that under the former, is statutory, for the relaxation in favour of trade of the general rule against the removal of fixtures was not by the common law extended to agriculture ; and a farm tenant had consequently no right to take away fixtures put up by him for merely agricultural purposes, even though convenient and necessary for his occupation, and though in doing so he left the premises in the same state as when he entered (*y*). It is nevertheless to be observed that where the real purpose of the fixture is of a trade kind, the mere fact that it may relate to agriculture as well (as in the case of nurserymen's fixtures (*z*)), or that such trade is one derived from the land and depending essentially on its produce (as in the case of colliery fixtures (*a*)), does not, as has been seen, prevent such fixture from being removable, even at common law.

By 14 & 15 Vict. c. 25, it is provided (*b*), that where any agricultural tenant erects, with his landlord's written consent, at his own expense and not in pursuance of some obligation in that behalf, any farm building, or "any other building, engine, or machinery," either for agricultural purposes or for those of trade and agriculture, it shall become his property and be removable by him, and this notwithstanding that such property be permanently fixed to the soil, or that it consist of separate buildings ; so as the tenant, however, do not injure the freehold in the removal, and so as he put it in the same condition as before the erection was made. And he must also first give a month's written notice of his intention to make the removal to the landlord, who is to have the option of purchase at a price to be settled between the parties by arbitration.

(*x*) *Lyon v. London City & Midland Bank*, [1903] 2 K. B. 135. See this case explained by Lord Lindley in *Reynolds v. Ashby*, [1901] A. C. 466, where it is pointed out that where chattels are annexed to real property in such a manner as to become fixtures the title to them, though in a stranger, may

be lost, especially if so annexed with his knowledge or authority.

(*y*) *Elwes v. Maw*, 3 East, 38.

(*z*) *Supra*, p. 697.

(*a*) *Supra*, at note (*l*), p. 696.

(*b*) Sect. 3. The section is not set out literally.

The Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), further enacts (c), that "where after the commencement of this Act (d) a tenant (e) affixes to his holding (f) (or acquires (g)) any engine, machinery, fencing, or other fixture, or erects (or acquires (g)) any building for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed or erected (or acquired (g)) in pursuance of some obligation in that behalf, or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy.

"Provided as follows:—

"(1.) Before the removal of any fixture or building the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect to the holding:

"(2.) In the removal of any fixture or building the tenant shall not do any avoidable damage to any other building or other part of the holding:

"(3.) Immediately after the removal of any fixture or building the tenant shall make good all damage occasioned to any other building or other part of the holding by the removal:

"(4.) The tenant shall not remove any fixture or building without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it:

"(5.) At any time before the expiration of the notice of removal the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the notice of removal, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding; and any difference as to the value shall be settled by a reference under this Act (h) as in case of compensation (but without appeal)" (i).

It has been held—and from the absence of any reference to this

(c) Sect. 34.

(d) 1st Jan. 1884: sect. 53.

(e) See the definition in sect. 61, where the tenancies dealt with by the Act are also indicated: *post*, p. 728.

(f) As to the holdings to which the Act applies, see s. 54; *post*, pp. 728, 729.

(g) 63 & 64 Vict. c. 50, s. 4.

(h) See *post*, p. 735.

(i) The appeal, however, given by the Act in the case of compensation (see sect. 23) is now done away with, except where the arbitrator states a case on a point of law: see *post*, p. 743.

section in sect. 55 (*k*) the inference seems inevitable—that there is nothing to prevent the parties to a tenancy from contracting themselves in respect of fixtures out of the Act (*l*), as the Act of 1875, which the later Act has replaced and repealed, expressly enabled them to do (*m*). The repeal, however, saves any right in respect of fixtures affixed to a holding before the commencement of the later Act (*n*); so that fixtures erected while the earlier Act was in force (*o*) are still regulated by that Act. It will, however, be sufficient to state that the provision in regard to fixtures contained in that Act (*p*) is an exact counterpart of sect. 34 of the later Act (*q*), except (1) that it applies throughout to fixtures only instead of to fixtures *or buildings*; (2) that it does not apply in terms to “fencing”; (3) that it does not contain an express provision that the fixture must be removed before or within a reasonable time after the termination of the tenancy; and (4) that it contains a clause excluding from its scope a steam engine erected by the tenant without giving written notice to the landlord of his intention to do so, or after written notice of objection given by the latter.

Where, after January 1st, 1896 (*r*), “it is agreed in writing (*s*) that a holding shall be let or treated as a market garden” (*t*), the provisions of sect. 34 of the Agricultural Holdings Act (*u*) are to “extend to every fixture or building affixed or erected by the tenant to or upon such holding for the purpose of his trade or business as a market gardener.” And he may further “remove all fruit trees and fruit bushes planted by him on the holding and not permanently set out,” provided he do so before the termination of his tenancy (*x*). What the effect of this legislation may be is,

(*k*) See, as to 46 & 47 Vict. c. 61, s. 55, *post*, p. 730.

(*l*) *Mears v. Callender*, [1901] 2 Ch. 388.

(*m*) 38 & 39 Vict. c. 92, s. 54.

(*n*) 46 & 47 Vict. c. 61, s. 62.

(*o*) *I.e.*, from 14th Feb. 1876 (38 & 39 Vict. c. 92, s. 2), to 1st Jan. 1884.

(*p*) Sect. 53.

(*q*) *Supra*, p. 700.

(*r*) 58 & 59 Vict. c. 27, s. 2. As to the application of the Act to tenancies current at its commencement (1st Jan. 1896), see sect. 4, and *King v. Eversfield*, [1897] 2 Q. B. 475, cited *post*, p. 731. It has been decided that sect. 4 is not retrospective, and only entitles lessees holding under such tenancies to compensation for those improvements which

may have been executed after the commencement of the Act: *Smith v. Callender*, [1901] A. C. 297 (decided under a similar clause of a Scotch Act); *Mears v. Callender*, *supra*. But after the end of the year 1908, the section is to apply to improvements executed before 1st Jan. 1896, equally as to those executed after that date (6 Edw. 7, c. 56, ss. 5, 9).

(*s*) 58 & 59 Vict. c. 27, s. 3 (1).

(*t*) See sect. 6 for interpretation.

(*u*) As part of which Act the Act in question is to be read and construed: sect. 1.

(*x*) Sect. 3 (5). If he fail to do so, such trees or bushes remain the property of the landlord, who need pay him no compensation for them: *id.*

perhaps, not altogether clear. It has already been pointed out (y) that both these classes of improvements (buildings and fruit trees) are in the case of market gardens removable as trade fixtures at common law. With regard to the former, it is not thought that an enabling provision like the one in the Agricultural Holdings Act can operate to deprive the tenant of a right he would otherwise have possessed; and it would appear, therefore, that the only cases where it would be necessary for him to give the notice which that provision requires are, first, where the buildings he wishes to remove are not (*e.g.*, from their substantial character) properly "fixtures" at all (z), and secondly, where he wishes to remove fixtures after the termination of the tenancy. With regard, however, to the trees and bushes, it does seem possible that the direct exclusion by the Market Gardeners Act of those which are "permanently set out" might effectually displace, in the case of market gardens, any right of removal which the tenant might otherwise have had. It will be noticed that the right to compensation for trees and bushes of this kind is expressly conferred upon him by the Act (a).

Where an allotment is let by a district or parish council under the provisions of the Allotments Act, 1887 (b), it is specially provided (c) that "a tenant of an allotment may, before the expiration of his tenancy, remove any fruit and other trees and bushes planted or acquired by him, for which he has no claim for compensation";—and also that where he erects a toolhouse, shed, greenhouse, fowl-house, or pigstye he shall be at liberty, before the expiration of his tenancy, to remove the same, neither the council nor his successor in the tenancy being bound to take any such building or pay any compensation for it (d). Similar provisions applicable to "small holdings" let by a county council (e) are contained in the Small Holdings Act (f).

(3.) **Ornament and convenience.**—As in the case of trade fixtures, those affixed by a tenant for purposes of the above kind have become established as removable by a series of judicial decisions and *dicta*, without any recourse to statute law. The reason for the relaxation of the general rule in respect of these articles seems to

(y) *Supra*, p. 697.

(z) *Id.*, citing *Whitehead v. Bennett*, 27 L. J. Ch. 474.

(a) 58 & 59 Vict. c. 27, s. 3 (3): *post*, p. 729. See also Agr. H. Act, 1900 (63 & 64 Vict. c. 50), 1st sched., *ad fin.*

(b) 50 & 51 Vict. c. 48. See *ante*, p. 54.

(c) Sect. 7 (6).

(d) Sect. 7 (5).

(e) *Ante*, p. 55.

(f) 55 & 56 Vict. c. 31, s. 4 (2).

be founded on the essentially temporary purpose for which the annexation is usually designed, and on the inconvenience which would arise to tenants if by every slight attachment to the freehold the landlord should obtain the absolute property in the article annexed (*g*). The privilege seems to be of a more limited nature than that in respect of trade fixtures (*h*). Thus it extends only to articles which are perfect chattels in themselves—and which serve for the most part as substitutes for mere movable furniture (*i*),—and not to things (*e.g.*, conservatories or glass-houses) in the nature of a building or erection (*k*), though of a temporary character and easily movable (*l*).

The right of removal in any particular case depends on the particular circumstances (*m*); and all that can be said in a general way is that such right *may* be defeated either from the mode (*i.e.*, the close degree) of the annexation (*n*), or from the permanent nature of the purpose for which the annexation was made (*o*) (as showing that the fixture is essentially a part of the building (*p*)), or from the physical injury to the freehold which would be likely to result (*q*), if the injury caused by removal would be one of a substantial kind (*r*). But where the purpose of the annexation (as in the case of tapestry) is clearly for ornamentation, and solely for the better enjoyment of the article affixed, and the mode of annexation is not closer than is necessary for such enjoyment, the inference in favour of removability will always prevail (*s*).

With regard to the question of injury, it may be mentioned that it appears to have been generally understood in practice, in all cases where fixtures are taken down, that the tenant is liable to repair the damage the premises may sustain by the act of removal; and in like manner that where a fixture has been put up in substitution for an article which was attached to the premises at the time of the demise, the tenant in taking down his own fixture is bound to

(*g*) *Amos & F.* 116.

(*h*) *Id.*, 126.

(*i*) *Id.*, 117. See examples, *infra*, p. 704.

(*k*) *Buckland v. Butterfield*, 2 B. & B. 54; *Jenkins v. Gething*, 2 J. & H. 520.

(*l*) *Amos & F.* 117.

(*m*) *Buckland v. Butterfield*, *supra*, per Dallas, C. J.

(*n*) *Buckland v. Butterfield*, *supra*; *Jenkins v. Gething*, *supra* (as to boiler). Cf. *Grymes v. Bouveren*, 6 Bing. 437, per Tindal, C. J.

(*o*) *Gibson v. Hammersmith Ry. Co.*, 2 Dr. & Sm. at p. 609; *Buckland v. Butter-*

field, 4 Moore, 440, per Graham, B. (as to the pinery).

(*p*) *D'Eyncourt v. Gregory*, L. R. 3 Eq. at p. 396; *Norton v. Dashwood*, [1896] 2 Ch. 497. But see these cases discussed in *In re De Falbe*, *infra*.

(*q*) See *Avery v. Cheslyn*, 3 A. & E. 75; *Ex parte Burdoy*, 5 D. M. & G. at p. 410.

(*r*) See *Martin v. Roe*, 7 E. & B. at p. 244.

(*s*) *In re De Falbe*, [1901] 1 Ch. 523; *affd.* (H. L.), *sub nom.* *Leigh v. Taylor*, [1902] A. C. 157.

restore the former article or to replace it by another erection of a similar description (*t*). It seems, however, that he is not bound to restore brickwork, &c., in a perfect state, as if the article it was intended to support or cover were there, but only to leave it in such a state as would be most useful and beneficial to the landlord or to those who might next take the premises, doing no unnecessary damage in the removal (*u*). Nor, in the case of removing tapestry affixed to the walls of a room, is the tenant, though bound to make good actual injury to the walls, liable for the consequential expenses of re-decoration (*x*). The fact that an article can be moved in its entire state is an element to be considered in drawing the conclusion that it is removable (*y*); and so is the existence of a common practice by which the landlord allows it to be paid for by an incoming to an outgoing tenant (*y*).

Fixtures under the present head are of two kinds: (1) those purely of ornament or decoration; (2) those for domestic use or of ordinary convenience. To the first class belong such articles as hangings and tapestry (*z*), pier and looking-glasses (*a*), chimney-pieces, whether marble or not (if "ornamental") (*b*), cornices (*c*), window blinds (*d*), marble slabs (*e*), and wainscot fixed to the wall by screws (*f*). To the second class belong stoves and grates fixed in brickwork (*g*), pumps (*h*), iron backs to chimneys (*i*), furnaces (*k*) and coppers (*l*), ovens and ranges (*m*), mash-tubs and water-tubs (*n*), rails, fences, and hurdles (*o*), fixed tables and book-cases (*p*), cupboards fixed with holdfasts (*q*), clock-cases (*r*), bells (*s*), and gas-fittings (*t*).

(*t*) *Amos & F.* 124.

(*u*) *Foley v. Addenbrooke*, 18 M. & W. at p. 196. (Here there was a special covenant, but the same principle probably applies.)

(*z*) See *In re De Falbe*, *supra*.

(*y*) *Grymes v. Boweren*, 6 Bing. 437.

(*z*) *Squier v. Mayer*, 2 Freem. 249; *Harvey v. Harvey*, 2 Str. 1141; *In re De Falbe*, *supra*.

(*a*) *Beck v. Rebou*, 1 P. Wms. 94. Cp. *Birch v. Dawson*, 2 A. & E. 37.

(*b*) *Leach v. Thomas*, 7 C. & P. 327; *Bishop v. Elliott*, 11 Exch. 113.

(*c*) *Avery v. Cheslyn*, 3 A. & E. 75.

(*d*) *Colegrave v. Dias Santos*, 2 B. & C. 76, per Abbott, C. J.

(*e*) See *Allen v. Allen*, Mosely, 112, per Lord King, L. C.

(*f*) *Ex parte Quinoy*, 1 Atk. 477, per Lord Hardwicke, L. C.; *Elwes v. Maw*, 3 East, at p. 53; *Buckland v. Butterfield*, 2 B. & B. at p. 58; *Grymes v. Boweren*, 6 Bing. at p. 439.

(*g*) *R. v. St. Dunstan*, 4 B. & C. 686, per Bayley, J.; *R. v. Lee*, L. R. 1 Q. B. at p. 254, per Blackburn, J.

(*h*) *Grymes v. Boweren*, *supra*.

(*i*) *Harvey v. Harvey*, 2 Str. 1141.

(*k*) *Squier v. Mayer*, 2 Freem. 249.

(*l*) *Grymes v. Boweren*, *supra*, per Tindal, C. J.

(*m*) See *Winn v. Ingilby*, 5 B. & A. 625; *Darby v. Harris*, 1 Q. B. 895.

(*n*) *Colegrave v. Dias Santos*, 2 B. & C. 76, per Abbott, C. J.

(*o*) *Fitzherbert v. Shaw*, 1 H. Bl. 258, per Gould, J.; *Amos & F.* 411.

(*p*) *Amos & F.* 411. Cf. *Birch v. Dawson*, 2 A. & E. 37.

(*q*) *R. v. St. Dunstan*, *ubi sup.*

(*r*) *Amos & F.* 411.

(*s*) *Lydia v. Russell*, 1 B. & Ad. 394, explained in *Pugh v. Arton*, L. R. 8 Eq. 626.

(*t*) *Amos & F.* 114, n.

III. The removal of fixtures is often made the subject of express stipulation in leases; and when this is the case, the principles laid down in the foregoing pages no longer apply. The question to be decided in each case becomes, under these circumstances, one merely of construction of particular covenants or agreements; nor can the existence of any local custom regulating such removal then be taken into account (*u*).

Sometimes the covenant is in terms to deliver up all fixtures (*x*), or all fixtures of a certain kind (*y*), implying that others may be removed (*z*)—*i.e.*, as against the landlord (*z*),—but not implying that the tenant's right to such others is absolute, and that the landlord has not entered into covenants inconsistent with it (*a*). Sometimes it is to deliver up all fixtures at a valuation, either at the lessor's option (*b*), or not (*c*). Sometimes the parties agree that some fixtures should be removable and others not (*d*) (usually movable as distinguished from fixed erections, machines, or materials (*e*)). Sometimes it is expressly stipulated that the tenant may remove fixtures except in certain specified circumstances, *e.g.*, upon the incurring of forfeiture (*f*), or that he may remove them only in the event of determination of the lease by effluxion of time (*g*).

As a rule, the restriction upon the tenant's right of removal—for, as already stated (*h*), in the generality of leases the covenant is inserted in favour of the landlord—is contained in the covenant to repair; the tenant, after undertaking to keep in repair the premises demised to him, agreeing to the effect that he will yield them up so in repair at the expiration or sooner determination of the term, together with all fixtures, &c., belonging thereto (*i*). When this is the case, he loses the right of removing fixtures which otherwise the law would have given him (*k*); for it is always competent to him to renounce that right (*l*). Such a stipulation will not, however, except under special circumstances (*m*), prevent

(*u*) *Martyr v. Bradley*, 9 Bing. 24.

(*x*) *Watson v. Lane*, 11 Exch. 769.

(*y*) *Porter v. Drew*, 5 C. P. D. 143;
Thomas v. Jennings, 66 L. J. Q. B. 5.

(*z*) *Stansfeld v. Mayor of Portsmouth*,
4 C. B. N. S. 120, per Williams, J.

(*a*) *Porter v. Drew*, *supra*, per
Grove, J.

(*b*) *Clark v. Crownshaw*, 3 B. & Ad.
804.

(*c*) *Sloror v. Hunter*, 3 B. & C. 368.

(*d*) *Stansfeld v. Mayor of Portsmouth*,
supra.

F.

(*e*) *Foley v. Addenbrooke*, 13 M. & W.

174; *Summer v. Bromilow*, 34 L. J. Q. B.
130.

(*f*) *R. v. Topping*, M'Cl. & Y. 544.

(*g*) *Dumergue v. Rumsey*, 2 H. & C.
777.

(*h*) *Supra*, p. 691.

(*i*) For a special instance relating to
trees, see *Doe v. Crouch*, 2 Camp. 449.

(*k*) *Ante*, p. 221.

(*l*) *Dumergue v. Rumsey*, *supra*.

(*m*) *Mansfield (Lord) v. Blackburne*, 6
Bing. N. C. 426, cited *infra*.

him from removing articles in the nature of fixtures (*n*) which are really chattels (*o*). Thus a covenant to yield up in repair the premises, and all other erections and buildings put up during the term, prevents the removal of trade fixtures (*p*), as being included within the term "erections" (*q*). So, in a demise of salt springs, a covenant to yield up the "works" in repair will prevent the removal of salt-pans, used for boiling salt, as being a necessary part of such works; and this without regard to the consideration whether they are fixtures or only chattels (*r*).

Such a covenant is often expressly framed to include "improvements" made by the tenant upon the premises. Covenants of the type "to yield up in repair the premises *together with all erections, buildings, and improvements*" will prevent the removal, for instance, of a glass-house (*s*), or of a verandah (*t*), erected during the term and attached to the freehold: of a plate-glass front substituted during the term for a shop window, but not fastened except by wedges (*u*): and of millstones substituted for old ones by the tenant of a mill (*x*);—for the covenant to yield up in repair applies to any fixture substituted by the tenant for one which is within its scope, and will consequently make it also irremovable (*y*). Nor can an improvement once substituted be set free by bringing back its discarded predecessor (*z*). But a covenant of this type, if qualified by a proviso expressly giving the tenant liberty to remove during the tenancy "all such improvements . . . as shall be capable of removal without injury to the land itself," will not disentitle him to pull down a substantial brick building erected by him, and remove the materials other than those composing the foundations below the soil (*a*): for the term "improvements" is more applicable to something attached to and forming an integral part of the thing improved than to something which is merely added to it or placed upon it without annexation or union (*b*). And a covenant to leave (amongst other things) "all improvements

(*n*) *Supra*, pp. 691—695.

(*o*) *Naylor v. Collinge*, 1 Taunt. 19; *Davis v. Jones*, 2 B. & A. 165; *Beaufort (Duke of) v. Bates*, 3 D. F. & J. 381.

(*p*) *Naylor v. Collinge*, *supra* (Dean *v. Allalley*, 3 Esp. 11, *semb. cont.*).

(*q*) *Bidder v. Trinidad Petroleum Co.*, 17 W. R. 153.

(*r*) *Mansfield (Lord) v. Blackburne*, *supra*.

(*s*) *West v. Blakeway*, 2 M. & Gr. 729.

(*t*) *Penry v. Brown*, 2 Stark. 403.

(*u*) *Haslett v. Burt*, 18 C. B. 893

(reported as *Burt v. Haslett*, 25 L. J. C. P. 295).

(*x*) *Martyr v. Bradley*, 9 Bing. 24.

(*y*) *Sunderland v. Newton*, 3 Sim. 450.

(*z*) *Cosby v. Shaw*, 23 L. R. (1.) 181.

(*a*) *London & South African, &c., Co. v.*

De Beers Mines, [1895] A. C. 451.

(*b*) *Id.*, per Lord Macnaghten. And the same thing, *mutatis mutandis*, may be said of the word "erections," especially when used in connection with "buildings": per Vaughan Williams, L. J., in *Lambourn v. McLellan*, *infra*.

made by the tenant" on a farm the subject of a demise does not *necessarily* extend to glass-houses erected by him upon a portion of the farm which had been converted into a market garden (c).

Where the covenant, after specifying certain fixtures, uses "general words," it must be construed (as in all similar cases) by reference to the rule of *ejusdem generis*. Thus, if the fixtures specified are all of an irremovable kind, and the enumeration is followed by general words, such as "and other fixtures and articles in the nature of fixtures which shall be affixed to the premises," such words will be held only to apply to irremovable fixtures also, and will not debar the tenant from removing others (d). So upon a demise of premises for a manufactory, containing a stipulation that only machinery of a certain kind should be erected without the lessor's consent, it was held that a general provision (for delivering up the premises in repair at the end of the term) which, after enumerating particular articles all of a kind either actually or potentially irremovable, was expressed to include "all . . . fixtures and things which . . . shall be fixed, fastened, or belong to" the premises, did not extend to trade machinery (e). Where, however, the enumeration includes removable as well as irremovable fixtures, it has been laid down that the contrary result should ensue (f); but to deprive the tenant of his ordinary right of removing trade fixtures the clearest words must be used, and the onus of proof is strongly on the landlord (g).

In addition to the case where fixtures are rendered irremovable by express contract, an agreement to the same effect will be sometimes implied from conduct or circumstances. Where, for instance, a tenant took and used, by permission of his landlord, timber belonging to the latter, for the express purpose of building a cattle-shed, it was held that he could not remove it afterwards, though he had added a few materials of his own (h). So where, while an action of ejectment was pending, the parties agreed that the landlord should sign judgment but that execution should be stayed for a given period, it was held that during the time such stay endured the tenant could not remove fixtures, for the fair meaning of the

(c) *Mears v. Callender*, [1901] 2 Ch. 388.

(d) *Bishop v. Elliott*, 11 Exch. 113.

(e) *Lambourn v. McLellan*, [1903] 2 Ch. 268.

(f) See *Wilson v. Whately*, 1 J. & H.

436 (where the point was not actually decided); *Bidder v. Trinidad Petroleum Co.*, 17 W. R. 153.

(g) *Lambourn v. McLellan*, *supra*; *Cosby v. Shaw*, 23 L. R. (I.) 181.

(h) *Smith v. Render*, 27 L. J. Ex. 83.

agreement was that he should deliver up the premises in the same condition as when the agreement was made (*i*). And where trustees, seised under a devise in fee of a farm, leased to the defendant (one of themselves) for a term, and afterwards, in the character of trustees only, conveyed the land to the plaintiff in fee with all fixtures, it was held that the defendant being a party to the conveyance could not, after the conveyance, under the general law or custom of the country, remove fixtures from the premises at the expiration of his term (*k*).

Additional observations.

(a) **As to time of removal.**—The right to remove fixtures only exists during the term (*l*), because as they are attached to the reversion they vest in the landlord when the tenant gives up possession on its expiration (*m*). (On the other hand, it seems clear that no property in them vests in the landlord until the term comes to an end (*n*).) Where, however, possession is retained by the tenant afterwards, it does not appear to be quite certain how far the right continues (*o*). It has been said to extend to "such further period of possession by him as he holds the premises under a right still to consider himself as tenant" (*p*), or as he holds them "in the capacity of a tenant" (*q*),—a period which has been described as (for this purpose) an *excrescence* (*r*), or an *enlargement* (*s*), of the term. It has been said that possibly this may intend a tenancy at sufferance (*t*), but at any rate not after the landlord has determined it by re-entry (*t*), or by the issue of a writ in ejectment (*u*). It seems, however, clear that the mere fact that the tenant retains possession of the demised premises after the expiration of his interest does not have the effect of extending the period during which he may sever fixtures (*x*); nor does the circumstance that it may be found as a fact that the tenant has not

(*i*) *Fitzherbert v. Shaw*, 1 H. Bl. 258; *Heap v. Barton*, 12 C. B. 274.

(*k*) *Wiltshire v. Cottrell*, 1 E. & B. 474.

(*l*) *Lyde v. Russell*, 1 B. & Ad. 394.

(*m*) *Meuz v. Jacobs*, L. R. 7 H. L. at p. 490, per Lord Hatherley.

(*n*) *Cumberland Banking Co. v. Maryport Hematite, &c., Co.*, [1892] 1 Ch. 415, per North, J.

(*o*) *Ex parte Willoughby*, 44 L. T. at p. 785.

(*p*) *Weeton v. Woodcock*, 7 M. & W. 14; explained in *Ex parte Brook*, 10 Ch. Div. at p. 109.

(*q*) *Roffey v. Henderson*, 17 Q. B. at p. 586, per Patteson, J. (reported as *Ruffey v. Henderson*, 21 L. J. Q. B. 49).

(*r*) *Mackintosh v. Trotter*, 3 M. & W. 184, per Parke, B.

(*s*) *Ex parte Stephens*, 7 Ch. Div. 127, per James, L. J.

(*t*) *Leader v. Homewood*, 5 C. B. N. S. 546.

(*u*) *Barff v. Probyn*, 64 L. J. Q. B. 557.

(*x*) *Amos & F.* 133, where *Penton v. Robart*, 2 East, 88, is questioned on this ground.

abandoned the fixtures necessarily make any difference (*y*), even though the reason for his holding over is that his successor in the tenancy has failed to pay him an agreed price for them (*z*). And where the continuance in possession is under a new lease or agreement, his right to carry away the fixtures is determined, and he is in the same situation as if the landlord, being seised of the land together with the fixtures, had demised both to him (*a*); so that if a tenant taking a fresh lease of the demised premises wishes to preserve his right to remove fixtures they must be made the subject of a special agreement (*b*).

The general rule appears equally to apply where the tenant by his own act puts an end to the term, as where it expires by effluxion of time; so that after a surrender, for instance, the tenant's right to sever fixtures is gone (*c*). In the case of a forfeiture, in spite of a somewhat guarded *dictum* of the Court of Appeal (*d*), that possibly the tenant may have a reasonable time afterwards, when he remains in possession, to sever his fixtures, it has more than once been decided that he has no such right, and that a person claiming fixtures under him is in no better position than himself (*e*).

Where the tenant becomes bankrupt, and his trustee seeks to disclaim the lease, the Court has special power to make such orders with respect to fixtures as it thinks just (*f*). It has been held, however, that the same rule as to fixtures removable by the tenant will in general be applied between the landlord and trustee as would obtain if the lease had been determined in the ordinary way, and that if the landlord decline to take them over at a valuation the trustee may upon disclaiming have a reasonable time in which to remove them (*g*).

And the application of the general rule is subject to the

(*y*) *Leader v. Homewood*, *supra*.

(*z*) *Barff v. Probyn*, *supra*.

(*a*) Notes to *Elwes v. Maw*, 2 Sm. L. C. at p. 221, citing *Fisherbert v. Shaw*, 1 H. Bl. 258, and *Heap v. Barton*, 12 C. B. 274 (see these cases, p. 708, *supra*). Cf. *Thresher v. East London Waterworks Co.*, 2 B. & C. 608, cited *ante*, p. 221.

(*b*) *Thorpe v. Milligan*, 5 W. R. 336; *S. C.* (reported as *Sharpe v. Milligan*) 23 Beav. 419.

(*c*) *Ex parte Brook*, 10 Ch. Div. at p. 110, per Thesiger, L. J. (As to the rights of third parties in such case, see *ante*, p. 642.)

(*d*) *Id.*, at p. 109. Inasmuch as it must remain uncertain whether the

lessor will enforce the forfeiture or not (see p. 322, *ante*), the case might perhaps have been held to fall within a principle to be presently referred to: see *infra*, at note (*m*).

(*e*) *Minshall v. Lloyd*, 2 M. & W. 450; *Weeton v. Woodcock*, 7 M. & W. 14; *Pugh v. Arton*, L. R. 8 Eq. 626. In *In re Glasdir Copper Works*, [1904] 1 Ch. 819, however, Joyce, J. (it is thought incorrectly), declined to apply the latter branch of the above principle in the case of a receiver for debenture holders of a company holding premises under a lease.

(*f*) 46 & 47 Vict. c. 52, s. 55, sub-s. (3); *ante*, p. 455.

(*g*) *In re Moser*, 13 Q. B. D. 788.

following observations. First, it does not apply where the right to remove fixtures at the end of the term is made the subject of express agreement (*h*); for such agreement implies that the tenant should have a reasonable time to remove them upon the determination of the lease, whether by forfeiture or otherwise (*i*). Secondly, it does not apply to articles in the nature of fixtures (*k*) which are really chattels (*l*). Thirdly, it does not apply where the expiration of the tenancy (*e.g.*, in leases for lives or at will) is necessarily uncertain (*m*). Fourthly, it does not apply as against third parties, agreeably to a principle previously referred to, when the tenant determines his interest by surrender (*n*). Fifthly, it has already been seen (*o*) that under the Agricultural Holdings Act the removal of fixtures is permitted, where the provisions of the Act are complied with, within a reasonable time after the termination of the tenancy.

A special agreement is often made by which the tenant forbears to remove fixtures at the expiration of his term, the landlord taking them at a valuation, and in that case the former can recover their value from the latter by action after the term (*p*); but a mere licence by the landlord to an outgoing tenant to leave fixtures on the premises, in order to make the best terms he can with his successor, will not (if not under seal) bind the latter to allow their removal after he has taken possession (*q*). On the other hand, the landlord may, without writing at all, enter into a binding *contract* to permit his tenant to leave fixtures after the expiration of his term and so long as the premises remain unlet, with a view to their purchase by the landlord or by an incoming tenant, and failing such purchase to remove them (*r*).

(b) **As to remedies available.**—Where the right of removing fixtures exists, the tenant or any other person who is prevented from exercising it may maintain an action (*s*) for the infringement

(*h*) *Stansfeld v. Mayor of Portsmouth*, 4 C. B. N. S. 120; *Sumner v. Bromilow*, 34 L. J. Q. B. 130.

(*i*) *Pugh v. Arton*, *supra*, per Malins, V.-C.

(*k*) *Supra*, pp. 691—695.

(*l*) *Wansbrough v. Maton*, 4 A. & E. 884.

(*m*) See *dicta* in *Oakley v. Monck*, L. R. 1 Ex. at p. 164; *Pugh v. Arton*, L. R. 8 Eq. at p. 630; *Ex parte Brook*, 10 Ch. Div. at p. 109.

(*n*) *Ante*, p. 642.

(*o*) *Supra*, p. 700.

(*p*) *Hallen v. Runder*, 1 C. M. & R. 266; *Colton v. Lingham*, 1 Stark. 39.

(*q*) *Roffey v. Henderson*, 17 Q. B. 574 (reported as *Ruffey v. Henderson*, 21 L. J. Q. B. 49).

(*r*) *Thomas v. Jennings*, 66 L. J. Q. B. 5, per Hawkins, J.

(*s*) *London and Westminster Loan Co. v. Drake*, 6 C. B. N. S. 798.

of such right (*t*). But while the fixtures remain attached to the freehold he cannot sue in trover (*u*), even during the continuance of the demise (*x*): a remark, however, which does not apply to articles in the nature of fixtures (*y*) which are really chattels (*z*). And immediately fixtures are severed trover may be brought for them: thus, it will lie at the suit of a tenant against his landlord for having unlawfully entered and removed them during the term (*a*). So if removed by a third party the tenant (*b*), or a purchaser or mortgagee from him (*c*), can sue for them in trover, though bound to leave them on the premises at the end of the term; and where irremovable fixtures are removed during the term by a purchaser from the tenant, their value may be recovered by the landlord in this form of action even during the subsistence of the term (*d*).

It follows from the above principle that the damages recoverable in an action of trover for fixtures are only their value as chattels (*e*), and not their value in an unsevered state as it would be estimated between outgoing and incoming tenants (*f*). In trespass, however (*i.e.*, trespass to goods), which may also be brought in respect of fixtures when once they are severed (*e.g.*, by landlord against tenant or *vice versa* (*g*)), their full value seems capable of being recovered (*h*). And though forms of action are no longer of importance, it would seem that, as the action of trespass appears more immediately directed to the *taking* of a man's property out of the possession of the owner (*i*), whenever the gist of complaint is the *removal* of fixtures by the defendant damages on the higher scale should be recoverable against him (*k*). The other form of the action of trespass (*i.e.*, trespass to land) will also lie at the suit of the tenant during the term for the removal of fixtures attached to the freehold:

(*t*) The measure of damages is the same as in trover (see next paragraph): *London and Westminster Loan Co. v. Drake*, *supra*.

(*u*) *Wilde v. Waters*, 16 C. B. 637; *Roffey (or Ruffey) v. Henderson*, *supra*.

(*x*) *Maackintosh v. Trotter*, 3 M. & W. 181.

(*y*) *Supra*, pp. 691—695.

(*z*) *Wansbrough v. Maton*, 4 A. & E. 884; *Davis v. Jones*, 2 B. & A. 165.

(*a*) *Dallon v. Whittem*, 8 Q. B. 961.

(*b*) *Hitchman v. Walton*, 4 M. & W. 409, per Parke, B., citing *Boydell v. M^cMichael*, 1 C. M. & R. 177.

(*c*) *Hitchman v. Walton*, *supra*.

(*d*) *Farrant v. Thompson*, 5 B. & A.

826. Cf. *Petre v. Ferrers*, 61 L. J. Ch. 426.

(*e*) *Clarke v. Holford*, 2 C. & K. 540.

(*f*) *McGregor v. High*, 21 L. T. 803; *Barff v. Probyn*, 64 L. J. Q. B. 557.

(*g*) *Amos & F.* 367.

(*h*) *Thompson v. Pettitt*, 10 Q. B. 101; *Moore v. Drinkwater*, 1 F. & F. 134.

(*i*) *Burroughes v. Bayne*, 5 H. & N. 296, per Martin, B.; *Day v. Bisbitch*, Cro. Eliz. 374.

(*k*) In *Clarke v. Holford*, *supra*, it was said, by Rolfe, B., that probably the defendant might be liable to another action for having brought the fixtures into the state of chattels.

but not at the suit of the landlord, because actual possession of the land is necessary at the time of the act complained of (*l*).

In an action by the tenant for wrongfully preventing the removal of fixtures at the end of the term, the proper way of arriving at the amount of damages has been said to be by ascertaining their value, having regard to their age and condition, when and as severed from the freehold for the purpose of re-erection elsewhere, less the cost of severing them (if done by the landlord), the cost of making good as far as possible the damage to the premises in severing, storing, and carrying away the materials, and the value of any permanent damage to the premises which cannot be made good (*m*).

Moreover, as already stated (*n*), the unlawful removal of fixtures by the tenant constitutes waste (*o*), and an injunction will consequently (*p*) be granted to restrain it before it is complete (*q*), though this does not apply in the case of articles in the nature of fixtures (*r*) which are really chattels (*s*); nor does the fact that such removal is also a breach of an express covenant prevent an action of waste from being maintainable (*t*).

But where fixtures are the subject of an express covenant or agreement between landlord and tenant, actions relating to them are usually brought for the breach of contract (*u*). It may be added that the price of unsevered fixtures cannot be recovered as for goods sold and delivered (*x*); that contracts for their sale are not within the Statute of Frauds (*y*); and that such contracts require a stamp (*z*), inasmuch as fixtures are not goods within the exemption of the Stamp Act (*a*).

Where a tenant fails to comply with a covenant to deliver up fixtures, it seems that the measure of damages is not necessarily their full value, but the actual benefit which would have accrued to the landlord if the covenant had been performed (*b*).

(*l*) *Amos & F.* 366. Cf. *ante*, p. 19.
(*m*) *Thomas v. Jennings*, 66 L. J. Q. B. 5, per Hawkins, J.
(*n*) *Ante*, p. 285.

(*o*) See *Hitchman v. Walton*, 4 M. & W. 409.

(*p*) *Ante*, p. 288.

(*q*) *Sunderland v. Newton*, 3 Sim. 450; *Richardson v. Ardley*, 38 L. J. Ch. 508; *Cosby v. Shaw*, 23 L. R. (1.) 181.

(*r*) *Supra*, pp. 691—695.

(*s*) *Kimpton v. Eve*, 2 V. & B. 349.

(*t*) *Kinlyside v. Thornton*, 2 W. Bl. 1111, cited *ante*, p. 283.

(*u*) *Martyr v. Bradley*, 9 Bing. 24; *Naylor v. Collinge*, 1 Taunt. 19.

(*x*) *Lee v. Risdon*, 7 Taunt. 188.

(*y*) *Lee v. Gaskell*, 1 Q. B. D. 700; *Thomas v. Jennings*, *ubi sup.* See now 56 & 57 Vict. c. 71, s. 4, and the definition of "goods" in sect. 62.

(*z*) *Wick v. Hodgson*, 12 Moore, 213; *Horsfall v. Hey*, 2 Exch. 778.

(*a*) 54 & 55 Vict. c. 39, 1st sched.

(*b*) *Watson v. Lane*, 11 Exch. 769; *Barff v. Probyn*, 64 L. J. Q. B. 557.

DIV. II.—EMBLEMENTS.

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(a) <i>At common law</i>	713	(b) <i>By statute</i>	715

(a) **At common law.**—A matter which sometimes arises for consideration upon the determination of a tenancy—though, as will be pointed out presently (c), it has now been deprived by statute of much of its importance—is that relating to *emblements*; i.e., the growing crops of those vegetable productions of the soil which are annually produced by the labour of the cultivator (d), and which a tenant, under certain conditions, has a right to claim. These conditions are two—first, his holding must be for an interest which is uncertain (e), e.g., a tenancy for life (whether his own or another's) (e), or for years determinable on life (e), or from year to year (f), or at will (g); secondly, its determination must be due to some act independent of his own will, e.g., the act of God (as in the case of the death of a tenant for life (h)), or that of the lessor (as in the case of the determination by him of a tenancy at will (i)), or that of the law (k). Where the tenancy is determined by the lessee's own act—as by surrender or forfeiture, or where a woman, tenant during widowhood, re-marries (l)—the right to emblements does not arise (m).

To deprive him of that right such determination need not be caused *immediately* by his own act; it is sufficient if it have for its immediate cause an act which is the natural consequence of his own act (n). Thus, in the ordinary case of forfeiture (when, as just stated, the right is lost) the immediate cause of determination is the act, not of the lessee, but of the lessor in electing to enforce it (o). So where a lessee suffered an execution where he was subject to a condition of re-entry if he should incur any debt upon which judgment should be signed and execution issued, it was held that he had no right to emblements, even though the immediate cause of determination was an act of the law, and even though,

(c) *Infra*, p. 715.
 (d) Wharton's Law Dict., s. v.
 (e) Co. Lit. 55 b.
 (f) *Kingsbury v. Collins*, 4 Bing. 202; *Haines v. Welch*, L. R. 4 C. P. 91, cited *infra*, p. 716.
 (g) Litt. s. 68.
 (h) Co. Lit. 55 b.
 (i) *Id.*; *Eaton v. Southby*, Willes, 131.

(k) 2 Black. Comm. 123. See *Oland's case*, 5 Co. 116 a.
 (l) Com. Dig. Biens (G. 2); *Bulwer v. Bulwer*, 2 B. & A. 470, per Abbott, C. J.
 (m) Co. Lit. 55 b.
 (n) See per Tindal, C. J., in *Davis v. Eytton*, *infra*.
 (o) *Id.* See *ante*, p. 651.

it being uncertain whether the incurring of the debt would be followed by execution, he might reasonably have been led to cultivate his lands during the interval (*p*). But a determination due to the lessee's own act will not deprive a sub-tenant holding under him of any right to emblements which he may otherwise have had (*q*).

Where the right to emblements exists, the tenant has free entry, egress, and regress to and from the premises to cut and carry them away (*r*), "for where the law doth give anything to one it giveth impliedly whatsoever is necessary for the taking and enjoying of the same" (*s*); and this right extends to a third person permitted by the tenant to sow on condition of sharing the crop with him (*t*), and can be asserted against any subsequent landlord claiming under the lessor (*t*). Upon the death of the tenant the right to emblements passes to his executors or personal representatives (*u*).

The right is confined to things yielding present annual profit (*x*), but it extends not only to corn sown but to roots planted (*e.g.*, potatoes (*y*)) or other annual artificial profits (*z*). It does not, however, apply to things which are not planted annually at the labour and expense of the tenant, but which are either a permanent or natural profit of the earth (*z*). Trees, for instance, whether bearing fruit or not, are not emblements (*a*), nor is a growing crop of grass, though sown from seed, and though ready to be cut for hay; for this is a natural product, although it may be increased by cultivation (*b*). But with regard to artificial grasses, such as clover, &c., it is otherwise (*c*). The tenant is entitled to a crop of that species only which ordinarily repays the labour by which it is produced *within the year* in which that labour is bestowed; that the crop may, in extraordinary seasons, be delayed beyond that period is immaterial (*d*). But though things which take more than a year to mature are thus incapable of being emblements, a right *in the nature thereof* is recognised in the tenant, if it happen that in the year when the plant is fit to gather so much labour and expense are necessarily incurred as may be deemed equivalent to the sowing and planting of ordinary crops (*e*). The right of the

(*p*) *Davis v. Eytton*, 7 Bing. 154.

(*q*) 2 Black. Comm. 124.

(*r*) Litt. a. 68.

(*s*) Co. Lit. 56 a.

(*t*) *Kingsbury v. Collins*, 4 Bing. 202.

(*u*) 1 Wms. Exors. 536 (10th ed.).

(*x*) Co. Lit. 55 b.

(*y*) *Evans v. Roberts*, 5 B. & C. at

p. 832, per Bayley, J.; *Haines v. Welch*, L. R. 4 C. P. 91, per Willes, J.

(*s*) 2 Black. Comm. 123.

(*a*) Co. Lit. 55 b.

(*b*) 1 Wms. Exors. 538.

(*c*) *Id.*, citing *Graves v. Weld*, *infra*.

(*d*) *Graves v. Weld*, 5 B. & Ad. 105.

(*e*) *Id.*, explaining *Latham v. Atwood*, Cro. Car. 515.

tenant is confined to that year's crop which is growing when his interest determines (*f*). It may be mentioned that emblements are "goods" within the Sale of Goods Act, 1893 (*g*).

(b) **By statute.**—But though the executors of tenants for life are, as against the remainderman, still entitled to emblements (*h*), in tenancies depending on the uncertain continuance of the landlord's interest (if at a rack-rent) the right has now, as against the landlord, been taken away, or rather exchanged for that of continued occupation till the end of the current year of the tenancy.

By 14 & 15 Vict. c. 25, s. 1, "Where the lease or tenancy of any farm or lands held by a tenant at rack-rent shall determine by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time, or other lawful means during the continuance of his landlord's estate. And the succeeding landlord or owner shall be entitled to recover and receive of the tenant, in the same manner as his predecessor, or such tenant's lessor, could have done if he had been living, or had continued the landlord or lessor, a fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor to the time of the tenant so quitting. And the succeeding landlord or owner and the tenant respectively shall, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions, and restrictions to which the preceding landlord or lessor and such tenant respectively would have been entitled and subject in case the lease or tenancy had determined in manner aforesaid at the expiration of such current year: provided always, that no notice to quit shall be necessary or required by or from either party to determine any such holding and occupation as aforesaid."

The "farm or lands" to the tenancy of which the Act applies is such land as would, independently of the Act, give rise to a

(*f*) *Graves v. Weld*, *supra*.
(*g*) 56 & 57 Vict. c. 71, s. 62.

(*h*) 2 Black. Comm. 122.

substantial claim for emblements (*i*), and not land, for instance, which could only be considered as a mere curtilage to a house (*i*). On the other hand, the Act does not apply only to agricultural tenants, but has been held to extend to the case of a tenant from year to year of a cottage with about an acre of land partly cultivated as a garden and partly sown with corn and planted with potatoes (*k*). Whether the mere fact that the land is of such a nature that a claim to emblements might arise in respect of it is sufficient, without showing that there are emblements in fact, for the statute to apply, seems doubtful (*l*).

Div. III.—TENANT-RIGHT.

SECT. 1.—APART FROM STATUTE.

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<i>Nature of the right</i>	716	<i>What interest conferred</i>	721
<i>How arising (custom of the country)</i>	718	<i>Against whom enforceable</i>	722
<i>Conditions precedent</i>	721	<i>How lost</i>	724

Nature.—At common law the landlord is *primâ facie* entitled to possession of everything in the nature of real property on the determination of the term (*m*); so that all growing crops—apart from “emblements” in the case of tenancies of uncertain duration (*n*)—thereupon vest in him. The tenant, on the other hand, being *primâ facie* entitled to everything in the nature of chattels, has a right to all crops which at that time are actually severed from the soil. For the benefit of agriculture, however, the operation of the common law in these respects is usually modified either by special agreement or by local custom, the tenant being generally entitled to the benefit of the away-going crops (*i.e.*, those sown in the last year of the term and not in a condition to be reaped before its expiration), or to receive compensation for his labour and expenditure in raising them, as well as payment for produce—like hay, straw, and manure—which he is bound, by force of agreement or custom, to leave behind him upon the land. And

(*i*) Per Willes, J., in next-cited case.
 (*k*) *Haines v. Welch*, L. R. 4 O. P. 91.
 (*l*) *Id.*, per Willes, J. And cp. *Stradbrooke v. Mulcahy*, 2 Ir. Com. L. Rep. 406.

(*m*) See *Caldcott v. Smythies*, 7 C. & P. 808, per Parke, B.
 (*n*) *Ante*, p. 713.

where he does necessary ploughing, and sows the land in the ordinary and proper course of husbandry, and leaves manure which is taken by the landlord for his own benefit, the law, without any allegation or proof of custom, will imply in his favour a contract by the landlord for payment (*o*). (On the other hand, a stipulation founded on a similar principle is met with in some tenancies, by which the tenant agrees to allow his landlord, in case of notice to quit being given on either side, to enter, by himself or an incoming tenant, at a specified time before the end of the term, for the purpose of ploughing, &c. (*p*).)

These privileges form what is usually called "tenant-right." Such right in the case of away-going crops is sometimes limited to a specified proportion of the demised lands (*q*); and when this is the case the tenant must carefully observe the prescribed limits, as any sowing by him in excess thereof will go to benefit the landlord (*r*), unless such sowing has been authorized by him (*s*), in which case the tenant may claim the whole crop even as against an incoming tenant who enters without notice of such authority having been given (*s*). On the other hand, the right of an outgoing tenant to receive payment or compensation is not confined to the matters above specified, but frequently extends to *improvements* (*t*) effected by him upon the premises, so as to enable him, for instance, in pursuance of a custom equally as of express stipulation, to recover from the landlord a proportion of the expense of necessary drainage, though the work has been carried out without the landlord's consent or knowledge (*u*).

All tenant-rights, as will be seen presently, are expressly saved by the Agricultural Holdings Acts (*x*). Like other rights, tenant-right is capable of assignment (*y*), and will pass by an assignment on the part of the tenant of his goods and effects, crops on the land, and all his "estate and interest thereon and therein" (*z*). The obligation to pay for tenant-right is not an obligation merely personal to the landlord, but is an obligation which "affects the

(*o*) *Martin v. Coulman*, 4 L. J. K. B. 37.

(*p*) *Milner v. Jordan*, 8 Q. B. 615 (reported as *Milner v. Myers*, 15 L. J. Q. B. 157).

(*q*) See, for instance, *Hyatt v. Griffiths*, 17 Q. B. 505; *Hunter v. Miller*, 4 Macq. 560.

(*r*) *Caldecott v. Smythies*, 7 C. & P. 808.

(*s*) *Griffiths v. Tombs*, 7 C. & P. 810.

(*t*) As to the regulation of this matter by statute, see *post*, p. 726 *et seq.*

(*u*) *Mousley v. Ludlam*, 21 L. J. Q. B. 64.

(*x*) 46 & 47 Vict. c. 61, s. 60; 63 & 64 Vict. c. 50, s. 1 (5).

(*y*) *Petch v. Tutin*, 15 M. & W. 110. But an assignee of a parol lease, not accepted as tenant, could not at law sue the landlord thereon: see *Elliott v. Johnson*, L. R. 2 Q. B. 120.

(*z*) *Cary v. Cary*, 10 W. R. 669.

land," so as to entitle the Court (a), in an action by the tenant to enforce payment, to allow service of the writ out of the jurisdiction (b). Where a tenant, instead of paying incoming valuation, agreed to pay a yearly interest on the sum, and "upon quitting to leave a valuation of tenant-right equal in value and of the same nature and kind as that found upon his entry," it was held that this undertaking did not create a debt merely personal to the lessor, but enured for the benefit of a subsequent landlord (c).

Difficulties sometimes arise in deciding how far the ordinary agreement for valuation of tenant-right, by which each party is to appoint a valuer, and a third person as umpire in case of a difference between them, amounts to a submission to arbitration, and is accordingly governed by the rules applicable to a proceeding of that nature (d). The general principle may be stated to be that if the persons appointed have to determine the matter by using solely their eyes, knowledge, and skill, the proceeding amounts only to a valuation (e); whilst if the intention of the parties is that there should be something in the nature of a judicial inquiry, and a decision arrived at by the persons appointed upon evidence to be adduced before them, it amounts to an arbitration (f). The distinction, of course, is between a proceeding whose object is to prevent a difference from arising at all, and one whose object is to settle a difference when a difference has once arisen (g).

How arising (custom of the country).—Tenant-right, as has just been seen, is (apart from statute) founded either on agreement or on custom. In the former case the only question that can arise is that of the construction to be given to the agreement relating to it. Where, for instance, a tenant undertook to leave at the expiration of his term all manure of the preceding year to be paid for at a valuation, and at no time to sell or give away any of the hay or straw of the farm which should always be spent thereon, it was held that the fact that the stipulation relating to the expiration of the tenancy applied to manure only did not cut down the scope of the provision as to hay and straw to the currency of the term, and

(a) Under R. S. C. 1883, O. 11, r. 1 (b).

(b) *Kaye v. Sutherland*, 20 Q. B. D. 147. The writ must have been issued by leave in the first instance: see p. 773, *post*.

(c) *Wagstaff v. Clinton*, C. & E. 45, Field, J.

(d) See the Arb. Act, 1889 (52 & 53 Vict. c. 49).

(e) *In re Dawdy*, 15 Q. B. Div. 426; *Re Hammond*, 62 L. T. 808.

(f) *Re Hopper*, L. R. 2 Q. B. 367, as explained by two last-cited cases.

(g) See *In re Carus-Wilson*, 18 Q. B. Div. 7 (reported as *In re Wilson*, 55 L. T. 864).

that he was consequently not entitled to take away or sell the straw of the away-going crop (*h*).

With regard, however, to the latter case a few observations may be necessary. The operation of local custom in superadding terms to a contract of tenancy, and the requirements such custom must satisfy in order to be applicable, have already been adverted to (*i*); and what has been stated in regard to these matters will, *mutatis mutandis*, apply to the subject of tenant-right, custom here being founded upon the principle that justice requires that a tenant should quit upon the same terms as he entered (*k*). A custom, for instance, regulating allowances for tenant-right, like a custom regulating the mode of cultivation (*l*), will apply to tenancies from year to year, whether created by express terms (*m*), or implied from holding over and the payment of rent (*n*). But where a tenant from year to year entitled to such rights accepts a lease for years which contains special provisions in respect of the same matters, his rights as *such yearly tenant* are gone (*o*); though a tenant entitled to compensation under the terms of a lease does not lose his right by the mere fact of taking a fresh lease at the end of the former in which nothing is said about compensation (*p*).

Moreover, a custom as to tenant-right, like one as to the mode of cultivation (*q*), may be displaced either by express provision, or impliedly from its inconsistency with a stipulation of the contract (*r*). And this inconsistency may arise in two ways.

First, the stipulation in question may relate directly to the same matter as the custom, but regulate it in a different manner (*s*). Thus a stipulation by the tenant to leave manure at the end of the term (without any mention of payment) excludes a custom to leave it on receiving payment (*t*). Similarly a stipulation by him to leave the premises with regard to manure in the same condition at the end of the term as on entry, or then pay for the difference, excludes, as inconsistent with it, a custom to pay for the manure on going in and receive for it on going out (*u*). A stipulation,

(*h*) *Boxburys (Duke of) v. Robertson*, 2 Bli. 156.

(*i*) *Ante*, p. 151.

(*k*) *Webb v. Plummer*, 2 B. & A. 746, per Bayley, J.

(*l*) *Ante*, p. 152.

(*m*) *Monsley v. Ludlam*, 21 L. J. Q. B. 64; *Alloway v. Steers*, 10 Q. B. D. 22.

(*n*) *Boraston v. Green*, 16 East, 71; *ante*, p. 396.

(*o*) *England v. Shearburn*, 52 L. T. 22.

(*p*) *Lane v. Moeder*, C. & E. 548, Day, J.

(*q*) *Ante*, p. 152.

(*r*) *Wigglesworth v. Dallison*, 1 Sm. L. O. 545 (11th ed.), and notes.

(*s*) See, e.g., *Boraston v. Green*, 16 East, 71.

(*t*) *Roberts v. Barker*, 1 Cr. & M. 808.

(*u*) *Clarke v. Boystone*, 13 M. & W. 752.

however, and a custom do not relate to the same matter within the above rule when the former applies only to the terms of *holding* and the latter to those of *quitting* (*x*); so that a stipulation, for instance, "to consume with stock on the farm all the hay, straw, and clover grown thereon, which manure shall be used on the said farm," does not exclude a custom entitling the tenant to be paid for unconsumed straw on quitting (*y*). Similarly a stipulation to keep all the covenants and obligations of a head lease does not displace a custom for an outgoing tenant to receive the value of fallows and dressings, though such custom be excluded from the head lease, because the obligations referred to are those in respect of occupation and cultivation (*z*).

Secondly, a stipulation, though silent as to a particular matter regulated by the custom, may relate to matters so closely connected with it as to raise the inference that the intention was to exclude the custom (*a*). Thus a stipulation for a tenant at the end of the term to receive payment in respect of specified matters excludes a custom to receive payment in respect of one of a similar kind which is not specified (*b*). Similarly a stipulation by the tenant to pay on entering for hay, straw, and manure, followed by a stipulation by the landlord to pay at the end of the term for the hay and straw, excludes a custom by which the tenant, being entitled to go out as he came in, might have claimed payment for the manure also (*c*).

But if the connection between such matters is not of so close a character as to raise the above inference, it will be otherwise. Thus a custom relating to the right of a tenant to payment for seeds and labour during the last year of his term is not excluded by a stipulation relating to payment for manure at the end of the term (*d*), or by a stipulation binding him to leave the manure without such payment (*e*).

So the fact that the clause in a lease conferring on the tenant the right to an away-going crop at a valuation, to be ascertained in a prescribed manner, expressly provides that the valuation shall be subject to certain deductions in the event of non-observance by the tenant of his obligations as to repairs and cultivation under the

(*x*) *Holding v. Pigott*, 7 Bing. 465.

(*y*) *Munoe v. Dennis*, 1 H. & N. 216.

(*z*) *Favell v. Gaskoin*, 7 Exch. 278.

(*a*) See per Parke, B., *Hutton v. Warren*, 1 M. & W. at p. 478.

(*b*) *Webb v. Plummer*, 2 B. & A. 746.

(*c*) *Clarke v. Westrope*, 18 C. B. 765.

And in such case, consequently, he will be entitled to payment for the straw only at what is called a "fodder," and not a "consuming," price: *id.*

(*d*) *Hutton v. Warren*, 1 M. & W. 466.

(*e*) *Senior v. Armytage*, Holt, N. P. C. 197.

covenants of the lease, and further provides that for any damages sustained the landlord shall have a right of lien on, and a right of deduction from, the amount of such valuation, does not exclude a custom under which further deductions are to be made in respect of the rateable proportion of rent, rates, and taxes payable in respect of the land from which the crop is taken, and in respect of the expense of getting such crop in (*f*).

Conditions precedent.—Sometimes it is stipulated that tenant-right shall be enjoyed by the lessee only upon the due observance by him of the covenants of the lease (*g*); and when this is the case a substantial observance of them will be sufficient (*h*). Where, however, the tenant is to be entitled to the away-going crops, the effect of his not having fulfilled his undertaking is not to divest the property in them from him, but only to give the landlord a right of action against him for damages,—a right, moreover, which will not enure for the benefit of an incoming tenant (*i*). A valuation to ascertain the sum to which the tenant-right will amount is not a condition precedent to the tenant's right of action against the landlord where there is no stipulation to that effect; but that right may be enforced as on a *quantum meruit* (*k*). So where an incoming agreed to pay an outgoing tenant for straw at a valuation to be made in the usual way, it was held that the latter might recover on a *quantum meruit* for straw which had been consumed by the former before such valuation had taken place (*l*).

What interest conferred.—The interest of an outgoing tenant who is entitled to an away-going crop amounts to a possession, and not merely to an easement (*m*), for it operates as a prolongation of the term as to the land on which the crop grows (*n*); and it continues not only till the crop is reaped, but till it is carried away (*o*). The same thing applies where a stipulation or custom allows the tenant to have the use of certain parts of the premises

(*f*) *Re Constable*, 80 L. T. 164.

(*g*) *Strickland v. Maxwell*, 2 Cr. & M. 539.

(*h*) *England v. Shearburn*, 52 L. T. 22.

(*i*) *Boraston v. Green*, 16 East, 71; *Holding v. Pigott*, 7 Bing. 465.

(*k*) *Sucksmith v. Wilson*, 4 F. & F. 1083.

(*l*) *Clarke v. Westrope*, 18 C. B. 765.

(*m*) *Griffiths v. Puleston*, 13 M. & W.

358, per Parke, B.; *Black v. Clay*, [1894] A. C. 368.

(*n*) *Boraston v. Green*, 16 East, 71, per Bayley, J. Cf. *In re Paul*, 24 Q. B. D. 247.

(*o*) *Griffiths v. Puleston*, *supra*. As to liability for rent upon the sale of the right to crops between outgoing and incoming tenant, see *Petrie v. Daniel*, 1 Smith, 199.

for the purpose of threshing or storing his crops (*p*), though ejectment may be brought during the time of such prolongation for those parts to which the privilege does not extend (*q*). But where a tenant is only entitled to payment for such crops at a valuation, they being left on the premises for the landlord or a succeeding tenant, his right is merely that of going on the land for the purpose of improving the crop, and not to exclude the landlord (*r*). In the same way the effect of a covenant to sell at a valuation all manure on the premises at the end of the term to the landlord or to an incoming tenant is to give the outgoing tenant the right of on-stand for such manure after the term, and therefore to entitle him to maintain trespass against the incoming tenant for removing it without such valuation or sale (*s*).

Against whom enforceable.—The person against whom these rights may be asserted by the outgoing tenant (whether there be an incoming tenant or not) is the landlord (*t*), though, in practice, agreements relating to them are often concluded directly with, or payments made directly by, the incoming tenant (*u*); and an alleged custom or usage that the outgoing tenant shall look to the incoming tenant for payment, to the exclusion of the landlord's liability, is unreasonable, and cannot be supported (*x*). The liability of the landlord may, however, be put an end to by special arrangement, where it has been exchanged—this being a question of fact (*y*)—for that of the incoming tenant (*z*); but the mere circumstance of the latter having entered will not render him liable to the outgoing tenant, nor will even the further circumstance of his having appointed a valuer to determine the amount to be paid, inasmuch as such valuer may have been nominated by him on behalf of the landlord (*a*). So, on the other hand, if an outgoing tenant exercise a right which does not belong to him, *e.g.*, take an away-going crop where not so entitled, the landlord, and not the incoming tenant, is the proper person to sue him (in trover) (*b*);

(*p*) *Beavan v. Delahay*, 1 H. Bl. 5;
Knight v. Benett, 3 Bing. 364.

(*q*) *Doe v. Houghton*, 1 M. & Ry. 208.

(*r*) *Strickland v. Maxwell*, 2 Cr. & M.
539.

(*s*) *Beaty v. Gibbons*, 16 East, 116.

(*t*) *Faviell v. Gaskoin*, 7 Exch. 273.

The writ in an action to enforce such rights may be endorsed as follows:
"The plaintiff's claim is £ , for crops,
tillage, manure [or as the case may be],

left by the plaintiff as outgoing tenant
of a farm": R. S. C. 1883, App. A,
Pt. III., s. 2.

(*u*) See *Suckemith v. Wilson*, 4 F. & F.
1088, per Martin, B.

(*x*) *Bradburn v. Foley*, 3 C. P. D. 129.

(*y*) *Codd v. Brown*, 15 L. T. 536.

(*z*) *Suckemith v. Wilson*, *supra*.

(*a*) *Codd v. Brown*, *supra*.

(*b*) *Davis (or Davies) v. Connop*, 1
Price, 53.

and *à fortiori* where the absence of such right in the outgoing tenant is due to his not having performed the covenants of the lease (c).

The landlord, moreover, as between himself and the outgoing tenant claiming compensation for tenant-right, is entitled to deduct any arrears of rent that may be due to him (d); and if the contract in respect of tenant-right, according to the common arrangement (e), is made, not with him, but with the incoming tenant, the latter will, on paying the rent, even without the outgoing tenant's consent, be discharged to the extent of such payment from his claims for tenant-right (f). But as the implied agreement between the two tenants, which gives rise to this result, is based on the fact of the landlord's power of distress for the arrears being available against the property taken over by the incoming tenant, it follows that the principle does not apply to matters over which such power has, at the time of such payment, ceased to exist (g).

The person liable to pay the outgoing tenant is primarily the landlord *for the time being*, i.e., the person from whom the tenant holds, and to whom he pays rent (h); so that where a landlord, being tenant in fee, died during the term, and devised the land to trustees for a term of years for payment of debts and legacies, and subject thereto to a person for life with remainders over, it was held that the tenant for life, who had taken possession and received rent from the lessee, was liable for the tenant-right, and had no claim to repayment either from the trustees or the remaindermen (i). The landlord does not free himself from liability if, subsequently to the determination of the term, he assigns his reversion, nor is the assignee liable in such a case (k). Where, however, a landlord assigned his reversion, subject to payment being made for the tenant-right, it was held that the assignees were liable although the tenancy was determined by the original landlord, and all rent had been paid to him (l).

(c) *Beraston v. Green*, 16 East, 71; *Holding v. Pigott*, 7 Bing. 465. Cf. *supra*, p. 721.

(d) See next-cited case.

(e) See last paragraph.

(f) *Stafford v. Gardner*, L. R. 7 C. P. 242. Cp. *Petrie v. Daniel*, 1 Smith, 199, cited *supra*, p. 721.

(g) *Stafford v. Gardner*, *supra*. See per Brett, J.

(h) Per Lindley, L. J., in next-cited case.

(i) *Manuel v. Norton*, 22 Ch. Div. 769.

(k) *Sucksmith v. Wilson*, 4 F. & F. 1083.

(l) *Womersley v. Dally*, 26 L. J. Ex. 219. The assignees, however, had confirmed the original notice to quit after the assignment of the reversion to them.

A covenant by a lessor and his assigns that he or they would at the expiration or sooner determination of the term pay for the growing crops and tillages at a valuation—followed by a proviso that the lessor or his assigns might resume possession on notice at any time during the term of any part of the premises, and that thereupon a reduction of rent at a specified sum per acre should be made, and that the lessor or his assigns should forthwith fence off the land so taken by him or them, and should pay for the crops and tillages the same amount as the lessee would be entitled to on quitting—does not amount to an undertaking on the part of the lessor to pay for the crops and tillages if the assigns do not, but merely imposes the burden on the persons who exercise the privilege which the proviso confers (*m*). Consequently where the lessor under such a covenant was tenant for life, and the remaindermen after his death assigned a portion of the property to a company who, after receiving an apportioned rent from the lessee and giving him notice of their intention to resume possession of such portion, failed (in consequence of a winding-up) to pay an agreed sum in respect of the crops and tillages, it was held that even if the company could be regarded as the “assigns” of the lessor within the covenant, the lessor’s executors could not be made liable to the lessee for the payment in question (*n*).

How lost.—(*a*) *Surrender, &c.*—If the tenant abandons his possession during the currency of the term, he loses his tenant-right (*o*); and even if such abandonment amount to a surrender by operation of law (*p*), the result is the same where such right is made to depend (*q*) upon the performance of the covenants of the lease (*r*). Similarly a custom as to away-going crops which prevails on the regular expiration of a Lady-day tenancy has been held to have no operation when the tenancy determined, by force of an arbitrator’s award, at another period of the year (*s*). And where the term ends by the expiration of the landlord’s interest before the tenant-right accrues, it seems that a custom entitling the tenant to compensation does not apply (*t*). On the other hand, the mere fact

(*m*) Per Lord Alverstone, C. J., in next-cited case.

(*n*) *Bath v. Bowles*, 93 L. T. 801.

(*o*) *Whittaker v. Barker*, 1 Cr. & M. 113.

(*p*) See p. 637, *ante*.

(*q*) *Supra*, p. 721.

(*r*) *England v. Shearburn*, 52 L. T. 22. And would not this result have been the same in any case? Cf. *Ex parte Dyke*, 22 Ch. Div. 410 (cited *ante*, p. 643).

(*s*) *Thorpe v. Eyre*, 1 A. & E. 926.

(*t*) See *Faviell v. Gaskoin*, 7 Exch. 273.

of holding over by the tenant after the expiration of his term does not deprive him of his claim to tenant-right (*u*).

Where, upon a lease for twenty-one years, containing a stipulation by the landlord for payment for certain fruit trees which might be grown or left on the premises at the "end" of the term, the tenant (as he was empowered to do) gave notice to determine at the end of the first fourteen years, he was held entitled to receive such payment, even though it was stipulated that in case of such notice being given, then "immediately after the expiration of such . . . fourteen years the lease and everything therein contained should cease and be absolutely void to all intents and purposes whatsoever, provided . . . that at the expiration or other sooner determination of the term" the landlord should make certain specified payments other than those of the kind in question (*x*).

(*b*) *Bankruptcy*.—Upon the bankruptcy of a lessee and application by his trustee for leave to disclaim the lease (*y*), the Court has power to make orders with respect to "tenant's improvements and other matters arising out of the tenancy" as it thinks just (*z*). If the trustee, however, instead of disclaiming, elect to adopt the lease, he will be entitled to the tenant-right like an ordinary assignee; nor will the landlord be allowed to set off against such claim rent which accrued due before the bankruptcy (*a*). But this does not apply where under the custom of the country the amount payable in respect of tenant-right is—not the absolute value of the subject-matter of valuation, but—the balance arrived at after deducting any arrears of rent (*b*). From a comparison of the two cases last cited the inference seems to be that it makes no difference to the application of the rule, whether the labour, tillages, &c., in respect of which the tenant-right accrues have been bestowed by the tenant himself or by the trustee.

(*c*) *Forfeiture*.—Where a lease provides for the tenant receiving certain payments for his tenant-right in respect of matters done by him during the "last year" of his term, or on its "expiration," such provisions only apply when the lease runs to an end in its

(*u*) *Martin v. Coulman*, 4 L. J. K. B. 37.

(*x*) *Bevan v. Chambers*, 12 T. L. B. 417. Cp. *Blore v. Giuliani*, [1903] 1 K. B. 356 (cited *ante*, p. 689); *Ex parte Dyke*, *supra*.

(*y*) *Ante*, p. 455.

(*z*) 46 & 47 Vict. c. 52, s. 55, sub-s. (3).

(*a*) *Alloway v. Steere*, 10 Q. B. D. 22.

(*b*) *In re Wilson*, 62 L. J. Q. B. 628.

natural course, and not when it is determined by forfeiture before that time (c). But it does not follow that the landlord can take the produce on the farm without payment, except perhaps where there is an absolute covenant against its removal at any time (d).

Div. III.—TENANT-RIGHT—(continued).

SECT. 2.—BY SPECIAL STATUTES.

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I.—Under the *Agricultural Holdings Acts* (e).

The compensation in respect of improvements, as well as of other matters of tenant-right, payable to a tenant on quitting his holding by virtue of agreement or custom, has now been treated of; and, as already stated (f), the right to such compensation is expressly preserved by the *Agricultural Holdings Acts* (g). It remains to deal with the provisions which are contained in those Acts (as well as with those in two other Acts of minor importance), and which apply to the subject of "improvements" only.

The principal Act (46 & 47 Vict. c. 61), which came into force on January 1st, 1884 (h), superseded an Act of similar purport passed in 1875 (38 & 39 Vict. c. 92), which it repeals (i); and though the repeal expressly saves all rights acquired under the earlier Act (i), yet as that Act itself soon became, from its merely permissive character (j), almost entirely a dead letter, it is not considered necessary to give any further account of it here.

The matter, however, has become in some respects complicated

(c) *Silcock v. Farmer*, 46 L. T. 404.
 Cf. *Breadalbane (Lord) v. Stewart*, [1904] A. C. 217.

(d) *Ex parte Dyke*, 22 Ch. Div. 410, per Cotton & Bowen, L. JJ.

(e) These Acts now consist of one passed in 1883, and two further Acts passed in 1900 and 1906—all of them (as will be seen) to be read together.

(f) *Ante*, p. 717.

(g) 46 & 47 Vict. c. 61, s. 60; 63 & 64 Vict. c. 50, s. 1 (5).

(h) 46 & 47 Vict. c. 61, s. 53.

(i) Sect. 62 (now itself repealed, with the usual saving, by Stat. Law Rev. Act, 1898, 61 & 62 Vict. c. 23).

(j) See 38 & 39 Vict. c. 92, ss. 54–57.

by the passing of an amending Act (to be construed with the former (*k*)), known as the Agricultural Holdings Act, 1900 (*l*). By this Act the procedure for ascertaining compensation for all improvements provided by the Act of 1883 has been remodelled, irrespective of the time at which they have been made; so that as far as mere procedure is concerned that Act need no longer be taken into account. But inasmuch as the provisions of the earlier Act relating to "substituted compensation" (*m*) (as well as those relating to improvements executed before its commencement (*n*)) are still in force, and inasmuch also as the amending Act expressly provides (*o*) that the compensation payable in respect of improvements which have been made before it came into operation (1st January, 1901) (*p*) is to be such (if any) as could have been claimed if the Act had not been passed, the clauses of the Act of 1883 other than those dealing only with procedure obviously still require consideration.

Further complications have now been introduced into the subject by the Agricultural Holdings Act, 1906, which, however, does not come into operation until January 1st, 1909 (*q*), and which is to be read, construed, and cited with the other Acts (*r*). The whole matter may at present be fairly described as being in a terrible state of disorder, and the reasons for postponing the simplification at all events of the procedure appear difficult to appreciate.

Effect and application of the Acts.—The general principle recognised by the Acts is one conferring upon the tenant the right, on quitting his holding, to obtain from his landlord compensation for improvements of a specified kind. The words "tenant" and "landlord" are both defined in the principal Act (*s*), a "tenant" including his executors, administrators, assigns, &c. (*s*), and the landlord, if only a limited owner, being furnished with the same powers in regard to the Act as if he were, in the case of a freehold, owner in fee, and, in that of a leasehold, owner of the whole estate therein (*t*). The Act also provides (*s*) that "the designations of landlord and tenant shall continue to apply to the parties until the conclusion of any proceedings taken under or in pursuance of

(*k*) Sect. 9 of next-cited Act.

(*l*) 63 & 64 Vict. c. 50.

(*m*) Sects. 3, 4, 5: *infra*, pp. 732-4.

(*n*) Sect. 2; *infra*, p. 732.

(*o*) 63 & 64 Vict. c. 50, s. 7.

(*p*) Sect. 13.

(*q*) 6 Edw. 7, c. 56. See s. 9.

(*r*) *Id.*, s. 10.

(*s*) 46 & 47 Vict. c. 61, s. 61.

(*t*) Sect. 42.

this Act in respect of compensation for improvements, or under any agreement made in pursuance of this Act" (u).

The basis of assessment is to be the sum which fairly represents the value of the improvement to an incoming tenant; but in estimating such value "what is justly due to the inherent capabilities of the soil" is not to be taken into account (x). From the 1st of January, 1909, however, this restriction is no longer to apply (y).

In the ascertainment, moreover, of the amount of compensation to which the tenant is entitled under the Act, regard is to be had (z) to any benefit which the landlord has given or allowed to the tenant in consideration of the tenant executing the improvement; and in the case of compensation for manures (a), to the value of the manure required by the contract of tenancy or by custom to be returned to the holding (b) in respect of any crops sold off or removed from the holding within the last two years of the tenancy or other less time for which the tenancy has endured, not exceeding the value of the manure which would have been produced by the consumption on the holding of the crops so sold off or removed (c). It will be seen, too, presently that if a claim for compensation has been made and referred, under the Act, to arbitration, any claim, whether by the landlord or by the tenant, "in respect of breach of covenant or otherwise in respect of the holding," or by the landlord in respect of "any waste (d) wrongfully committed or permitted by the tenant," may, at the instance of the party seeking to enforce it, be included in the arbitration (e).

The Act, it should be observed, only applies to a holding (*i.e.*, any parcel of land held by a tenant (f)) that is "wholly agricultural or wholly pastoral (g), or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden," and not "to any holding let to the tenant during his continuance in any office, appointment, or employment held under the landlord" (h); and the tenancies included within its scope are those only (whether by letting or agreement for letting) "for a term of

(u) See *infra*, p. 747.

(x) 63 & 64 Vict. c. 50, s. 1 (1).

(y) 6 Edw. 7, c. 56, ss. 1 (1), 9.

(z) 63 & 64 Vict. c. 50, s. 1 (3).

(a) Defined in sect. 9.

(b) See p. 291, *ante*.

(c) Sect. 1 (4).

(d) See p. 282, *ante*.

(e) Sect. 2 (3).

(f) 46 & 47 Vict. c. 61, s. 61.

(g) The word "agricultural" here refers to tilled land, and the word "pastoral" to land in grass for feeding purposes: *Westropp v. Elligott*, 9 App. Ca. 815, at p. 838, per Lord Fitzgerald (on a similar clause of an Irish Act).

(h) Sect. 54.

years, or for lives, or for lives and years, or from year to year" (i). But though the meaning of the Act seems to be that a tenant should not be entitled to compensation if his tenancy was less than a tenancy from year to year (k), there is nothing in the Act to the effect that a tenancy from year to year cannot be within it unless it possesses every incident of an ordinary tenancy from year to year (l).

The mere fact that there are buildings on the land does not, it is presumed, prevent the Act from applying, so long at all events as they are only accessory and not the principal subject of the demise; for the word "land" (in sect. 61) probably includes them (m), and their erection indeed, as will immediately appear, is contemplated by the Act itself (n). But it is thought that it only extends to cases where land is taken for farming or agricultural purposes *as a business* (o).

The Act recognises three classes of tenants' improvements (p): Class I. comprises improvements of a permanent character, like the erection of buildings (q); Class II. relates to drainage (r); Class III. includes for the most part improvements which feed the soil, such as manures (s). After the end of the year 1908 (t) "repairs to buildings, being buildings necessary for the proper cultivation or working of the holding, other than repairs which the tenant is himself under an obligation to execute," are to be reckoned

(i) Sect. 61.

(k) Per A. L. Smith, L. J., in next-cited case.

(l) Per Rigby, L. J., *King v. Eversfield*, [1897] 2 Q. B. 475; cited *ante*, p. 4.

(m) See 52 & 53 Vict. c. 63, s. 3.

(n) Cp. *Johnstone v. Symons*, 11 J. P. 618, cited *ante*, p. 151; and *Haines v. Welch*, L. R. 4 C. P. 91, cited *ante*, p. 716.

(o) Cp. the observations of Cave, J., in *In re Wallis*, 14 Q. B. D. 950. In the case of market gardens this result is expressly provided for: see 58 & 59 Vict. c. 27, s. 6.

(p) 63 & 64 Vict. c. 50, 1st sched.; substituted, by s. 1 (2), for 46 & 47 Vict. c. 61, 1st sched.

(q) Glass-houses probably fall within this class: *Meux v. Cobley*, [1892] 2 Ch. 253. As to the transfer from Class I. to Class III. of some of the specified improvements in the application of the Act to market gardens, see 63 & 64 Vict. c. 50, 1st sched., and (as regards improvements made before 1st Jan. 1901: sect. 7) 58 & 59 Vict. c. 27, s. 3 (2) and

(8), the effect of which is nearly but not quite the same. With regard to tenancies current at the commencement (1st Jan. 1896) of the M. G. Compensation Act, see 58 & 59 Vict. c. 27, s. 4 (as amended by 6 Edw. 7, c. 56, s. 5), referred to *ante*, p. 701.

(r) Moneys expended and costs incurred by a landlord in improvements of the first two classes are moneys in payment of which capital money under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), may be applied: 46 & 47 Vict. c. 61, s. 29.

(s) As to the addition of certain improvements to this class in the application of the Act to market gardens, see 63 & 64 Vict. c. 50, 1st sched., and (as regards improvements made before 1st Jan. 1901: sect. 7) 58 & 59 Vict. c. 27, s. 3 (8), which is in nearly, but not quite, the same terms. With regard to tenancies current at the commencement of the M. G. Compensation Act (1st Jan. 1896), see 58 & 59 Vict. c. 27, s. 4 (as amended by 6 Edw. 7, c. 56, s. 5), referred to *ante*, p. 701.

(t) Sect. 9 of next-cited Act.

improvements included in Class III.: "provided that the tenant, before beginning to execute such repairs, shall give to the landlord notice in writing of his intention, together with particulars of such repairs, and shall not execute the repairs unless the landlord fails to execute them within a reasonable time after receiving such notice" (u). On the other hand, the tenant, as from that time, is not to be entitled to any compensation in respect of improvements in that class, "which have been made for the purpose of making such provision to protect the holding from injury or deterioration (x) as is required by" the enactment on the subject previously referred to (y).

It will be seen in the sequel that in certain cases (z) the Act sanctions the making of agreements between landlord and tenant, under which compensation "substituted for compensation under the Act" is to be paid by the former to the latter. With this reservation, any agreement whose effect is to deprive the tenant of his right to claim compensation under the Act in respect of the above three classes of improvements, *so far as it deprives him of such right*, is void both at law and in equity (a). Having regard, however, to the above qualifying words (b), and to the fact that by the more recent Act the tenant's right to claim compensation regulated as to its amount by agreement instead of by the Act—in affirmance, as has been decided (c), of the then existing law—is now expressly recognised (d), it would seem that the word "void" in the above provision, as in many similar cases (e), means only "voidable" at the option of the tenant. The recognition of the validity of agreements for compensation in lieu of compensation provided by the Acts involves of course the consequence that the

(u) 6 Edw. 7, c. 56, s. 6.

(x) *Id.*, sect. 3 (3).

(y) *Ante*, p. 294.

(z) See 46 & 47 Vict. c. 61, ss. 3, 4, 5; *infra*, pp. 732—734.

(a) Sect. 55.

(b) The chief object of which is no doubt to leave the agreement intact as to any clauses it may contain beyond those struck at by the section.

(c) See *Newby v. Eckersley*, [1899] 1 Q. B. 465; *In re Pearson*, [1899] 2 Q. B. 618. It is, however, submitted that those decisions—in holding that sect. 57 of the Act of 1883 (now repealed) meant nothing more than that a tenant claiming under the Act should not be entitled to claim in respect of a scheduled improvement by custom or otherwise than

in manner authorized by the Act—went too far, and that the real object of sect. 57 was to introduce uniformity in tenants' claims for compensation by depriving a tenant entitled to claim under the Act of the option of resorting to local custom, though it contained nothing (so long as the requirements of sect. 55 were fulfilled) to prevent the parties from contracting themselves out of it if they chose to do so. It will be noticed that the word *agreement*, which appears in the second limb of the section, is omitted from the first. The point, however, is now one of merely academic interest.

(d) 63 & 64 Vict. c. 50, s. 1 (5).

(e) See Maxwell on Statutes, pp. 313—321 (4th ed.).

tenant cannot claim compensation under the Acts and the substituted compensation in addition; but to deprive him of the compensation given to him by the Acts, it must clearly appear that the lease or agreement under which he holds does, by covering the same ground, provide compensation "in lieu thereof," and the fact that the lease expressly states that the payments which it sanctions are in substitution for compensation under the Acts is not in itself conclusive of the matter (*f*).

Compensation under the Act can only be claimed by the tenant on quitting his holding *at the determination of his tenancy* (*g*), i.e., upon the cesser of the contract of tenancy "by reason of effluxion of time or from any other cause" (*h*); so that the manner in which the tenancy determines is immaterial. Nor is it necessary that the improvement in respect of which compensation is claimed should have been executed during the particular tenancy at the determination of which the quitting takes place: for if the tenant remains in his holding during a change or changes of tenancy, he is not, on quitting his holding thereafter, to lose his right to compensation by reason only that the improvements for which he claims were made during a former tenancy, and not during the tenancy at the determination of which he quits (*i*). And where an incoming tenant has, with the consent in writing of his landlord (*k*), paid to an outgoing tenant any compensation payable under the Act in respect of the whole or part of any improvement, he is entitled on quitting the holding to stand, with regard to his claim for compensation, in exactly the same position as the outgoing tenant would have been entitled to occupy if he had remained in the holding till that time (*l*).

The Act, however, contains certain restrictions upon the tenant's right of compensation for such improvements as are only effected by him when about to quit his holding; for it provides (*m*) that he shall receive no compensation for improvements, other than manures (*n*), executed by him (if a lessee) within a year before the expiration of his lease, or (if a tenant from year to year) at any

(*f*) *In re Smith & Devonshire (Duke of)*, 22 T. L. R. 619.

(*g*) Sect. 1 (1).

(*h*) 46 & 47 Vict. c. 61, s. 61.

(*i*) Sect. 58. As already seen (*ante*, p. 709), the common law rule as to fixtures in this respect is different.

(*k*) In the application of this clause to market gardens, such consent is unnecessary: see 58 & 59 Vict. c. 27,

s. 3 (4). As regards tenancies current at the commencement of the M. G. Compensation Act (1st Jan. 1896), see sect. 4 (as amended by 6 Edw. 7, c. 56, s. 5; referred to *ante*, p. 701), and *King v. Everysfield*, [1897] 2 Q. B. 475.

(*l*) Sect. 56.

(*m*) Sect. 59.

(*n*) Defined in 63 & 64 Vict. c. 50, s. 9.

time after he has given or received final notice to quit (*o*) or within the last year of his tenancy, unless he quits at the end of such year in pursuance of a notice given by the landlord after such improvement has been begun by him. But this does not apply where the tenant, whether a yearly tenant or a lessee, has before beginning the improvement served a notice on the landlord of his intention to begin it, and the landlord has either assented or failed within a month after receipt of the notice to object to the improvement being made (*p*).

The Act is naturally concerned primarily with improvements executed after its commencement, *i.e.*, after its coming into operation (*q*); but compensation under it may also be claimed for improvements executed before that date, provided the following conditions with regard to them are fulfilled:—(*a*) they have been executed within ten years before the 1st January, 1884; (*β*) the tenant is not entitled to compensation for them under any contract, custom, or the Act of 1875; (*γ*) (as to Classes I. and II. (*r*) only) the landlord has within one year after the commencement of the Act declared in writing his consent to the making of the improvement (*s*).

With regard to improvements executed after the commencement of the Act, a distinction has to be observed.

(*A.*) *Where the tenancy is under a contract current at the time of the commencement of the Act.* If specific compensation for an improvement of any of the three classes be payable, by virtue of an agreement in writing, custom, or the Act of 1875 (or in the case of improvements of Class III. (*t*), where no such specific compensation is payable, but a particular agreement in writing secures to the tenant a fair and reasonable compensation), such compensation shall be so paid and shall be deemed (*u*) to be substituted for compensation under the Act (*x*). A tenancy from year to year ceases to be one current at the time of the commencement of the Act within this rule, from the first day on which either the landlord or tenant could, the one by giving notice to the other immediately after the commencement of the Act, cause such tenancy to determine (*y*). The question of the difference in the compensation

(*o*) *I.e.*, a notice which has not been waived or withdrawn, but has resulted in his quitting his holding.

(*p*) 46 & 47 Vict. c. 61, s. 59.

(*q*) 52 & 53 Vict. c. 63, s. 36. See *supra*, p. 726.

(*r*) See *supra*, p. 729, at note (*p*).

(*s*) 46 & 47 Vict. c. 61, s. 2.

(*t*) See *supra*, p. 729, at note (*p*).

(*u*) Within sect. 55; *supra*, p. 730.

(*x*) Sect. 5.

(*y*) Sect. 61.

payable in the case of improvements made respectively before and after the 1st January, 1901, is dealt with under the next head (z).

(B.) *Where the tenancy is under a contract beginning after the commencement of the Act.* In this case different considerations apply to improvements of the different classes (a).

Class I.—The consent in writing of the landlord or his agent duly authorized in that behalf is here (b) a condition precedent to the recovery of compensation. It must have been obtained after the passing of the Act (25th August, 1883) and before the execution of the improvements; but it may be conveyed by the lease itself (c). Such consent may be given unconditionally or upon such terms as to compensation as may be agreed upon between the parties, and compensation payable under any agreement so made is deemed (d) to be substituted for compensation under the Act (b). But having regard to a clause in the Act which has already been discussed (e), the landlord (it has been so held) cannot impose, as a condition of his consent, the term that no compensation shall be paid for the improvement (f).

Class II.—In this case written notice (unless dispensed with by agreement "in a lease or otherwise") of the tenant's intention to execute the work, and of the manner in which it is proposed to be done, must be given to the landlord or his duly authorized agent not more than three, and not less than two, months before the improvement is begun. The parties may then agree upon terms of compensation, and compensation payable under an agreement so made is deemed (g) to be substituted for compensation under the Act. Or the landlord may, unless the tenant's notice has been previously withdrawn, undertake to execute the improvement himself: and in that case he may execute it "in any reasonable and proper manner which he thinks fit," charging the tenant either with a yearly sum not exceeding five per cent. on the outlay, or not exceeding such annual sum payable for twenty-five years as will repay such outlay in that period with interest at three per cent., such annual sum to be recoverable as rent. Failing one or other of the above courses, or where the landlord has given the undertaking above mentioned, and has neglected within a reasonable

(z) *Infra*, p. 731.

(a) See *supra*, p. 729, at note (p).

(b) Sect. 3.

(c) *Mears v. Callender*, [1901] 2 Ch. 388.

(d) Within sect. 55; *supra*, p. 730.

(e) Sect. 55; *supra*, p. 730.

(f) *Mears v. Callender*, *supra*.

(g) Within sect. 55; *supra*, p. 730.

time to carry it out, the tenant may execute the improvement, and will then be entitled to compensation under the Act (*h*).

Class III.—No consent on the part of the landlord is required here to entitle the tenant to compensation; but if a particular agreement in writing secures to him fair and reasonable compensation, having regard to the circumstances existing at the time of making such agreement, compensation (deemed (*i*) to be substituted for compensation under the Act) is to be payable in pursuance of such agreement (*k*).

By the Act of 1900, if the improvement be one executed before 1st January, 1901, the amount of compensation payable is regulated, not by that Act, but by the Act of 1883 (*l*). Under the Act of 1883 the specified improvements for which compensation is obtainable are somewhat less numerous than those in the more recent Act, though (as will be observed on comparing the schedules of the two Acts) the same in general character. The only other points of difference appear to be, first, that under the older Act the landlord's counterclaim in respect of waste or breach of covenant (if in relation to a matter of husbandry) by the tenant is confined to the period of four years next preceding the end of the tenancy (*m*); and, secondly, that in claims in respect of manures the amount to be set off to the credit of the landlord is, not the value of the manure required by the contract of tenancy or by custom to be returned to the holding (*n*), but the value of the manure that would have been produced by the consumption on the holding of any hay, straw, roots, or green crops sold off or removed from the holding within the last two years of the tenancy or other less time for which the tenancy has endured, except as far as a proper return of manure to the holding has been made in respect of such produce so sold off or removed therefrom (*o*).

Procedure.—Whether the improvement be one executed before or after the commencement of the Act of 1900 (*p*), that Act expressly provides (*q*) that its procedure for ascertaining the compensation payable by the landlord is to be followed; and that procedure equally applies *in respect of improvements comprised in the schedule*, whether the claim is made under the Act, or under the

(*h*) Sect. 4.

(*i*) Within sect. 55; *supra*, p. 730.

(*k*) Sect. 5.

(*l*) 63 & 64 Vict. c. 50, s. 7.

(*m*) 46 & 47 Vict. c. 61, s. 6.

(*n*) *Supra*, p. 728.

(*o*) 46 & 47 Vict. c. 61, s. 6.

(*p*) 1st Jan. 1901: 63 & 64 Vict. c. 50, s. 13.

(*q*) Sect. 7.

Act of 1883, or under custom, agreement, or otherwise (*r*). And although the specific provision of the principal Act (*s*), directing that a tenant shall not in respect of scheduled improvements claim compensation otherwise than in the manner authorized by the Act, is now repealed (*t*), the enactment contained in the more recent statute, that all differences between landlord and tenant with regard to compensation shall be settled by arbitration, is so precise (*u*) that it seems clear that all right of action is taken away. Consequently the decisions under the earlier Act, to the effect that neither the tenant (*x*) nor his trustee in bankruptcy (*y*) can obtain the compensation in question by a mere counterclaim—for instance, in an action of ejectment brought by the landlord,—will, it is thought, still hold good.

The Act provides (*z*) that if the landlord and tenant fail to agree as to the amount and time and mode of payment of the compensation, the difference is to be settled by arbitration in accordance with the provisions (if any) to that effect in any agreement between them, and in default of and subject to any such provisions as provided in the Act itself; and further (*a*), that, subject to any provision contained in any agreement between landlord and tenant, the Arbitration Act, 1889 (*b*), is not to apply to any arbitration to which this Act applies. Where an agreement of tenancy specifically provided that in case any dispute should arise between the parties over any matter contained therein it should be determined by arbitrators, each party choosing one whose joint decision should be binding on both parties, and upon arbitrators being respectively appointed the landlord refused to submit any question under the Act, or to allow his arbitrator to concur in the appointment of an umpire, and gave him a mandate limited to questions under the agreement, it was held that there was no submission under the Act, and consequently no jurisdiction to appoint an umpire under the clauses to be presently referred to (*c*).

(*r*) Sect. 2 (1). It would seem that the saving of tenant-right under custom or agreement given by sect. 1 (3) is (with regard to improvements within the Act) as to amount only: for sect. 2 (1), as will presently be seen, itself contains a saving as to procedure where agreed upon by the parties, although as from the beginning of the year 1909 this is now taken away by the Act of 1906.

(*s*) 46 & 47 Vict. c. 61, s. 57.

(*t*) 63 & 64 Vict. c. 50, s. 12.

(*u*) Sect. 2 (1).

(*x*) *Gas Light, &c., Co. v. Holloway*, 52 L. T. 434.

(*y*) *Schofield v. Hincks*, 58 L. J. Q. B. 147.

(*z*) Sect. 2 (1).

(*a*) Sect. 2 (8).

(*b*) 52 & 53 Vict. c. 49.

(*c*) *Re Cundall & Vavasour*, 95 L. T. 483. This decision seems based on a somewhat narrow construction of the section, one of the objects of which (it is

Claims "in respect of any breach of contract or otherwise in respect of the holding" may now, as already mentioned (*d*), be conjoined by either landlord or tenant with a claim made by the latter under the Act (*e*), so that resort by agreement to the Arbitration Act, which in the event of the existence of such claims was formerly the best course to pursue (*f*), is no longer necessary. And by a later enactment (*g*) it has been further provided—though the provision does not take effect until after the year 1908 (*h*)—that "all questions which" under any of the Agricultural Holdings Acts "or under the contract of tenancy are referred to arbitration shall, whether the matter to which the arbitration relates arose before or after passing of this Act, be determined, notwithstanding any agreement to the contrary, by a single arbitrator in accordance with the provisions set out in Part I. of the Second Schedule to the Agricultural Holdings Act, 1900 (*i*); and any sum awarded by such arbitrator to be paid shall be recoverable in manner provided by the Agricultural Holdings Acts, 1883 to 1900 (*j*), for the recovery of compensation." Consequently after the year 1908 the exclusion of the Arbitration Act will no longer be subject to provisions contained in any agreement between landlord and tenant, but will become absolute.

It is now proposed to set out the principal steps in the procedure under the Acts. No notice (as was required by the Act of 1883) is now necessary; but it is provided (*k*) that no "claim" shall be made in respect of any scheduled improvement after the determination (*l*) of the tenancy,—a provision which implies that a claim must be made not later than that date. There seems no reason to doubt that the word "claim" is used in the popular sense, and does not refer necessarily to the initiation of proceedings before the arbitration tribunal (*m*). *Where the claim relates to an improvement executed after such determination*, however, but while the tenant lawfully remains in occupation of part of the holding (*n*),

submitted) was to eke out any defective provisions in agreements for arbitration by the machinery of the Act. The matter, however, will, after the year 1908, lose all its importance: see *infra*.

(*d*) *Supra*, p. 728.

(*e*) 63 & 64 Vict. c. 50, s. 2 (3); *infra*, p. 737.

(*f*) 52 & 53 Vict. c. 49. See s. 12, and *In re Lloyd & Tooth*, [1899] 1 Q. B. 559; and cp. *Shrubb v. Lee*, 59 L. T. 376.

(*g*) 6 Edw. 7, c. 56, s. 1 (2)—the Agr. H. Act, 1906.

(*h*) Sect. 9.

(*i*) See *infra*.

(*j*) See p. 743, *infra*.

(*k*) 63 & 64 Vict. c. 50, s. 2 (2).

(*l*) *Supra*, p. 731.

(*m*) See *Powell v. Main Colliery Co.*, [1900] A. C. 366.

(*n*) See *ante*, pp. 721–2.

the claim may be made at any time before he quits that part (*o*). It would seem to follow that, in respect of improvements executed during the tenancy generally, the word "determination" can no longer refer, as it did under the Act of 1883, to the time when the tenant finally gives up possession of the subjects which in the statute are described (*p*) as his holding (*q*), and that the mere fact that the tenant lawfully holds over by agreement or custom will not entitle him (as under that Act it might have done) to make a claim during the period of such holding over.

Where any claim by a tenant has been referred to arbitration, and it is desired either by the landlord to reduce, or by the tenant to increase, its amount by reference to claims for waste or breach of contract in respect of the holding as before mentioned (*r*), the party so desirous may if he please give ("by registered letter or otherwise") written notice to the other not later than seven days after the appointment of the arbitrator or arbitrators (as hereinafter mentioned), requiring that the arbitration shall extend to the determination of such further claim (*s*).

Unless the parties otherwise agree—as they may do before, but not after, the end of the year 1908 (*t*)—the arbitration under the Act is to be before a single arbitrator (*u*), appointed, where agreed upon, by the parties, and in default of agreement on the nomination of the Board (*x*) of Agriculture (*y*), upon the application (*z*) in writing of either (*a*), such appointment, like every appointment, notice, revocation or consent under the rules, being in writing (*b*).

(*o*) The arbitrator may, if he think fit, make a separate award in respect of such claim: sect. 2 (*t*).

(*p*) See 46 & 47 Vict. c. 61, s. 54.

(*q*) *Black v. Clay*, [1894] A. C. 368; *Morley v. Carter*, [1898] 1 Q. B. 8.

(*r*) *Supra*, p. 728.

(*s*) 63 & 64 Vict. c. 50, s. 2 (3). See *Re Cundall & Vavasour*, 95 L. T. 483, cited *supra*, where an attempt was made unsuccessfully to rely, in the absence of the notice required by the above provision, on a previous consent of the parties to deal with disputes in matters contained in the agreement of tenancy by arbitration.

(*t*) *Supra*, p. 736.

(*u*) Sect. 2 (5).

(*x*) By order of the Board, dated Dec. 31st, 1900, a fee of 10s. 6d. is payable to the Board on the appointment (St. R. & O. 1901, No. 144: made under 31 & 32 Vict. c. 89, s. 6, the powers and duties of the Commissioners

under that Act, who, by virtue of 45 & 46 Vict. c. 38, s. 48, became the "land Commissioners for England," having been transferred, by 52 & 53 Vict. c. 30, s. 2, to the Board of Agriculture).

(*y*) Any forms for proceedings under the Act which may be prescribed by the Board of Agriculture are, if used, to be sufficient (2nd sched. Pt. I. r. 16), the same thing applying in arbitrations before two arbitrators or an umpire (Pt. II. r. 14). And such forms have now been prescribed by the Agr. H. Rules, 1900: see r. 2.

(*z*) See Form E in Agr. H. Rules, 1900.

(*a*) 63 & 64 Vict. c. 50, 2nd sched. Pt. I. r. 1.

(*b*) 2nd sched. Pt. I. r. 4; Pt. II. r. 9. As to service of any "notice, request, demand, or other instrument" under the Act, see 46 & 47 Vict. c. 61, s. 28, *ante*, p. 623.

If, however, the parties—as they may do before, but not after, the end of the year 1908 (*c*)—agree in writing that the proceedings shall not take place before a single arbitrator, each of them is to appoint an arbitrator (*d*). If a person appointed arbitrator dies, or is incapable of acting, or for seven days after notice from either party requiring him to act fails to do so, a new arbitrator may be appointed: in the case of arbitration before a single arbitrator as if no arbitrator had been appointed (*e*), and in the case of arbitration before two arbitrators by the party appointing him (*f*). Neither party is to have power to revoke the appointment of an arbitrator without the consent of the other (*g*); though an arbitrator may be removed for misconduct by the County Court (*h*), and in such event, or in that of an arbitration or award having been improperly procured, the County Court may set the award aside (*i*). The word “appointment,” as employed in these rules, would appear only to apply to an appointment made in view of actual differences under the Act (*k*), and not to the mere nomination of a person in the tenancy agreement to settle such differences between the parties, if any should arise, on the determination of the holding. Nor, if either party refused to appoint a person so nominated, would there apparently, from the exclusion of the Arbitration Act (*l*), be anything to prevent him from revoking (without the leave of any Court being obtained) the submission to that person (*m*); but it would seem that there would then be a “default of agreement” (*n*), upon which the nomination would rest with the Board of Agriculture.

Where it is desired to obtain either the removal of an arbitrator or the setting aside of an award, proceedings are commenced by filing an application (*o*)—to which all other parties to the arbitration and the arbitrator himself must be made respondents—with particulars annexed, containing a concise statement of the relief claimed and of the grounds on which the application is made, as well as the names and addresses of the respondents and of the

(*c*) From that time the whole of Part II. of the 2nd sched. is repealed: 6 Edw. 7, c. 56, s. 8.

(*d*) 63 & 64 Vict. c. 50, 2nd sched. Pt. II. r. 1.

(*e*) 2nd sched. Pt. I. r. 2.

(*f*) 2nd sched. Pt. II. r. 2.

(*g*) 2nd sched. Pt. I. r. 3; Pt. II. r. 8.

(*h*) 2nd sched. Pt. I. r. 6.

(*i*) 2nd sched. Pt. I. r. 13; Pt. II. r. 14.

(*k*) See 2nd sched. Pt. I. r. 5; *infra*, p. 742.

(*l*) *Supra*, p. 735.

(*m*) See Russell on Arbitration, p. 121 (9th ed.).

(*n*) Within r. 1, *supra*.

(*o*) Form 418 in App. to C. C. R. 1903. The same fees are payable as in an action for a sum of 20*l.*: Treas. Order, Dec. 30th, 1903, Sched. A, par. 42.

applicant and (where the proceedings are commenced through him) of his solicitor; the application being supported by an affidavit setting forth the circumstances and the grounds of the application (*p*). Provision is also made for the fixing, by the registrar or judge, of the time and place of hearing (*q*): the former giving notice (*r*) thereof to the applicant (*s*), and issuing such notice (*r*) to the respondents (*t*), together with copies of the documents, under seal of the Court, for service on them (*u*). Any affidavit intended to be used by any respondent on the hearing must be filed (*x*) and a copy (*u*) thereof served on the applicant or his solicitor; and a deponent to an affidavit must on notice (*u*) from the other side attend the hearing for cross-examination, and upon such hearing witnesses may be examined orally, the procedure being the same generally as on the trial of an action (*p*). The order of the judge, settled and signed by the registrar, is sealed and filed, and copies are served on all persons affected thereby (*y*).

Where the arbitration (before the end of the year 1908) by agreement is before two arbitrators, notice of every appointment of an arbitrator by either party must be given to the other (*z*). Before entering on the arbitration the two arbitrators must appoint an umpire (*a*), and if before award he die or become incapable of acting or fail to act for seven days after notice from either party requiring him to act, they may appoint another (*b*); and if they fail to appoint an umpire or (where he dies or fails to act) another umpire for seven days after a request in writing (*c*) from either party, an umpire will on the application (*d*) of either party be appointed by the Board of Agriculture (*e*). An umpire may be removed for misconduct in the same way as an arbitrator (*f*).

If (in the case—before the end of the year 1908—of arbitration

(*p*) C. C. R. 1903, O. 40, r. 4. The necessary documents (prescribed in the rule) must be delivered to the registrar by the applicant at the same time.

(*q*) When the hearing takes place at another Court, a fee of 10s. is payable to the registrar of that Court: Treas. Order, Dec. 30th, 1903, Sched. B, par. 24.

(*r*) A fee of 2s. 6d. is payable by the applicant: *id.*

(*s*) Form 419 in App.

(*t*) Form 420 in App.

(*u*) As to time and manner of service, see r. 4, *ubi sup.*

(*x*) A fee of 1s. is payable on filing: Treas. Order, Dec. 30th, 1903, Sched. B, par. 24.

(*y*) C. C. R. 1903, O. 40, r. 4. A fee of 5s. (and 4d. per folio for all copies of order which may have to be served beyond the first) is payable to the registrar: Treas. Order, Dec. 30th, 1903, Sched. B, par. 24.

(*z*) 63 & 64 Vict. c. 50, 2nd sched. Pt. II. r. 3.

(*a*) 2nd sched. Pt. II. r. 5.

(*b*) 2nd sched. Pt. II. r. 6.

(*c*) 2nd sched. Pt. II. r. 9.

(*d*) See Form G in Agr. H. Rules, 1900.

(*e*) 2nd sched. Pt. II. r. 7. By order of the Board, dated Dec. 31st, 1900, a fee of 10s. 6d. is payable to the Board on the appointment (St. R. & O. 1901, No. 144). See note (*x*), p. 737, *supra*.

(*f*) 2nd sched. Pt. II. r. 14.

before two arbitrators) for fourteen days after notice by one party to the other to appoint an arbitrator or (where an arbitrator dies or fails to act) another arbitrator, the other party fails to do so, then on the application (*g*) of the former party the appointment will be made by the Board of Agriculture (*h*).

The arbitrator (or where—before the end of the year 1908—two are appointed the arbitrators or umpire (*i*)) may administer oaths, and take the affirmation of parties and witnesses; and witnesses are, if he or they think fit, to be examined on oath or affirmation (*k*), any person who wilfully and corruptly gives false evidence before him or them incurring the penalties of perjury (*l*). The parties and all persons claiming through them respectively are, subject to any legal objection, to submit to be examined by the arbitrator (or where—before the end of the year 1908—two are appointed the arbitrators or umpire (*m*)) on oath or affirmation in relation to the matters in dispute; and, subject to such objection, must produce before him or them all samples, books, deeds, papers, accounts, writings, and documents within their possession or power which may be required or called for, and “do all other things which during the proceedings” he or they “may require” (*n*).

The arbitrator (or where—before the end of the year 1908—two are appointed the arbitrators or umpire (*o*)) may, at any stage of the proceedings, state in the form of a special case for the opinion of the County Court any question of law arising in the course of the arbitration (*p*). Such special case, which must be signed by the arbitrator, and may be filed (*q*) by him or any of the parties to the arbitration with the registrar (a copy being also filed therewith for the use of the judge), is to be divided into paragraphs numbered consecutively, and must state concisely such facts and documents as may be necessary to enable the judge to decide the questions of law raised thereby; and upon the argument of the case (*r*) the judge (who, with the parties, may refer to the whole contents of such documents) may draw from such facts and documents any inference, whether of fact or law, which might have

(*g*) See Form F in Agr. H. Rules, 1900.
 (*h*) 63 & 64 Vict. c. 50, 2nd sched.
 Pt. II. r. 4.
 (*i*) 2nd sched. Pt. II. r. 14.
 (*k*) 2nd sched. Pt. I. r. 8.
 (*l*) Sect. 2 (7).
 (*m*) 2nd sched. Pt. II. r. 14.
 (*n*) 2nd sched. Pt. I. r. 7.
 (*o*) 2nd sched. Pt. II. r. 14.

(*p*) 2nd sched. Pt. I. r. 9.
 (*q*) A fee of 2s. 6d. is payable on filing:
 Treas. Order, Dec. 30th, 1903, Sched. B,
 par. 24.
 (*r*) A hearing fee of 20s. is payable by
 the party filing the case or on whose
 application the case is stated: Treas.
 Order, Dec. 30th, 1903, Sched. A, par.
 41.

been drawn therefrom if proved at the hearing of an arbitration. But he may always remit the case for re-statement or further statement to the arbitrator (*s*). The order of the judge, settled and signed by the registrar, is sealed and filed, and copies are served on all parties and on the arbitrator (*t*).

If such a course should become necessary, either party may apply to the County Court for an order directing the arbitrator (or, before the end of the year 1908, arbitrators or umpire) to state a case for its opinion (*u*). Such application (*v*) must be made in Court on notice in writing, which must set forth concisely the question of law which it is desired to have stated, and must be supported by an affidavit (*x*) (which, together with the application (*x*), must be filed (*y*) with the registrar) setting forth the facts of the case and the question of law arising thereon. Any affidavit intended to be used by any party in opposition to the application must be filed (*z*), and a copy (*x*) served on the applicant or his solicitor; and a deponent to an affidavit must, on notice (*x*) from the other side, attend the hearing for cross-examination, and upon such hearing witnesses may be examined orally (*v*). The order of the judge, settled and signed by the registrar, is sealed and filed, and a copy is served on the arbitrator and on all other persons affected thereby (*a*).

The opinion of the County Court on any question stated as above described is to be final, unless, within the time and in accordance with the conditions prescribed by the Rules of the Supreme Court (*b*), either party appeals to the Court of Appeal (*c*), from whose decision no appeal lies (*d*).

The arbitrator, where he acts singly, is to make and sign his

(*a*) C. C. R. 1903, O. 40, r. 3. See *id.*, as to right of any party to be furnished by registrar (but at his own cost) with copy of the case; and as to notice (see as to fee payable thereon, Treas. Order, Dec. 30th, 1903, Sched. B, par. 24) fixing day for hearing (Form 416 in App.).

(*t*) *Id.* (See Form 417 in the App.) A fee of 5s. (and 4d. per folio for all copies of order which may have to be served beyond the first) is payable to the registrar: Treas. Order, Dec. 30th, 1903, Sched. B, par. 24.

(*u*) 63 & 64 Vict. c. 50, 2nd sched. Pt. I. r. 9.

(*v*) C. C. R. 1903, O. 40, r. 2 (see Form 415 in App.).

(*x*) See *id.*, as to time and manner of service thereof, or of copies. A fee of 2s. 6d. is payable on order for short

service: see Treas. Order, Dec. 30th, 1903, Sched. B, par. 24.

(*y*) A fee of 2s. 6d. is payable on filing: Treas. Order, Dec. 30th, 1903, Sched. B, par. 24.

(*z*) A fee of 1s. is payable on filing: *id.*

(*a*) C. C. R. 1903, O. 40, r. 2. A fee of 5s. (and 4d. per folio for all copies of order which may have to be served beyond the first) is payable to the registrar: Treas. Order, Dec. 30th, 1903, Sched. B, par. 24.

(*b*) See R. S. C. 1883, O. 58, r. 20 (R. S. C. 1898, r. 4), applied to the Act now in question by R. S. C. 1900, r. 10.

(*c*) It will be noticed that the appeal does not follow the usual rule of lying to a Divisional Court.

(*d*) 63 & 64 Vict. c. 50, s. 2 (6).

award within twenty-eight days of his appointment, or within such longer time as the Board of Agriculture (*e*) may (whether the time for making the award has expired or not) direct (*f*). Where (before the end of the year 1908) there are two arbitrators, they are to make and sign their award in writing (*g*) within twenty-eight days after the appointment of the last-appointed of them, or on or before any later day to which by any writing signed by them they may enlarge the time, not being more than forty-nine days from the appointment of the last-appointed of them (*h*). If they allow their time (original or extended) to expire without making an award, the umpire may forthwith enter on the arbitration in their stead: as he may also do if they deliver to either party or to him a notice in writing stating that they cannot agree (*i*). In either of those events the umpire is to make and sign his award within one month after the time (original or extended) appointed for making the award of the arbitrators has expired (*k*). As in the case of an arbitration before a single arbitrator, the time for making the award may from time to time be extended by the Board of Agriculture (*l*), whether the time for making the award has expired or not (*m*).

The arbitrator (or, where, before the end of the year 1908, two are appointed, the arbitrators or umpire (*n*)) must, *on the application of either party* (*o*), specify the amount awarded in respect of any particular improvement or improvements (*p*); and where compensation is claimed under the Act, compensation deemed, under the Act of 1883 (*q*), to be substituted for compensation under the Act is, so far as can (consistently with the terms of any agreement under which it is payable) be ascertained by the arbitrators or umpire, to be awarded in respect of any improvements thereby provided for (*r*). After the end of the year 1908, the rule to be applied is that "the arbitrator shall, on the

(*e*) As to application for the purpose, see Form H. in Agr. H. Rules, 1900.

(*f*) 63 & 64 Vict. c. 50, 2nd sched. Pt. I. r. 5.

(*g*) The words "in writing," singularly enough, which occur in the rule next cited, are omitted from the corresponding clause of Pt. I.; but as the arbitrator, as just seen, has to sign his award, the omission would not appear to be material.

(*h*) 2nd sched. Pt. II. r. 10.

(*i*) 2nd sched. Pt. II. r. 11.

(*k*) 2nd sched. Pt. II. r. 12.

(*l*) As to application, see Form H in Agr. H. Rules, 1900.

(*m*) 63 & 64 Vict. c. 50, 2nd sched. Pt. II. r. 13.

(*n*) 2nd sched. Pt. II. r. 14.

(*o*) This qualification is new:—the specific provision of the Act of 1883, that the award is not to award a sum generally for compensation (sect. 19), being repealed.

(*p*) 2nd sched. Pt. I. r. 10.

(*q*) Sects. 3, 4, 5, *supra*, pp. 732-4.

(*r*) 46 & 47 Vict. c. 61, s. 17, as modified by 63 & 64 Vict. c. 50, s. 12.

application of either party, specify the amount awarded in respect of any particular improvement or *any particular matter the subject of the award* (s). The award of the arbitrator (or, where, before the end of the year 1908, two are appointed, the arbitrators or umpire (t)) is to be final and binding on the parties and the persons claiming under them respectively (u), though he or they may always correct therein "any clerical mistake or error arising from any accidental slip or omission" (x); it must fix a day, not sooner than one month nor later than two months after its delivery, for the payment of the money awarded for compensation, costs or otherwise; and it is to be in such form as may be prescribed (y) by the Board of Agriculture (z).

If such money—and the same thing applies to money *agreed* to be so paid—awarded for compensation, costs or otherwise be not paid within fourteen days of the time when it is so payable, it is recoverable (except where the landlord is only a trustee (a)) upon order made by the judge of the County Court like money ordered to be paid by the Court under its ordinary jurisdiction (b).

An application under the above provision for money *awarded* to be paid—as distinguished from an application under it for money *agreed* to be paid (in which case the proceedings are by action commenced by plaint and summons in the ordinary way, particulars of demand being filed, which should state concisely the nature of the claim and the order asked for (c))—is made in Court on notice in writing: and on filing the application (d) the applicant must produce to the registrar the original award or a duplicate, and file a copy, together with an affidavit (e) verifying both the original and the copy award and the amount remaining due thereunder (f). If the application is for the recovery of, or includes the recovery of,

(s) 6 Edw. 7, c. 56, s. 1 (3).

(t) 63 & 64 Vict. c. 50, 2nd sched. Pt. II. r. 14.

(u) 2nd sched. Pt. I. r. 11. The (limited) right of appeal given by sect. 23 of the principal Act is thus put an end to. As to stating special case, see *supra*, pp. 740, 741.

(x) 2nd sched. Pt. I. r. 12.

(y) Agr. H. Rules, 1900, r. 1. See Form A, and as to recitals therein of appointment of arbitrator, arbitrators, or umpire, see Forms B, C, D.

(z) 63 & 64 Vict. c. 50, 2nd sched. Pt. I. r. 10 (replaced, after the year 1908, by 6 Edw. 7, c. 56, s. 1 (3)).

(a) 46 & 47 Vict. c. 61, s. 31, *infra*, p. 748.

(b) Sect. 24, as modified by 63 & 64 Vict. c. 50, s. 12.

(c) C. C. R. 1903, O. 40, r. 8. This rule, however, in requiring an action in such case to be brought, appears to conflict directly with the terms of the Act, and should therefore, perhaps, be deemed *ultra vires*.

(d) A fee of 2s. 6d. is payable on filing: Treas. Order, Dec. 30th, 1903, Sched. B, par. 24.

(e) A fee of 1s. is payable on filing: *id.*

(f) C. C. R. 1903, O. 40, r. 7. (See Form 421 in App.)

any money awarded to be paid for costs, the affidavit must state the amount at which such costs have been agreed upon or allowed on taxation, and that a demand for payment of such amounts, with (in the case of taxation) a copy of the certificate of the result of taxation, has been served on the party against whom the application is made at least fourteen days previously (*g*). The application is not to be numbered as a plaint, but a copy of the application and affidavit is to be served on the party against whom the application is made (*h*). Any affidavit intended to be used in opposition to the application must be filed and a copy (*i*) served on the applicant or his solicitor: and a deponent to an affidavit must, on notice (*k*) from the other side, attend the hearing for cross-examination, and upon such hearing witnesses may be examined orally. The order of the judge on the application, which is settled and signed by the registrar, is sealed and filed (copies being served on all persons affected thereby), and is to be enforceable in the same manner as a judgment or order of the Court (*l*).

Inasmuch, however, as parties cannot by agreement confer on any court a coercive jurisdiction which it does not by law possess (*m*), it follows that an order under the above section (*n*) cannot, even by express agreement or acquiescence, be made to apply to matters not within the Act (*o*). Nor can the judge give himself jurisdiction by wrongly deciding a point of law (*p*). But it is now specifically provided (*q*) that any sum awarded to be paid by a landlord or tenant in respect of claims for waste or breach of contract which may be conjoined, in the manner already stated (*r*), with claims under the Act shall be recoverable in like manner as under the principal Act (*s*): a provision which will apparently entitle the landlord, where he succeeds in establishing a counterclaim greater in amount than the sum found to be due to the tenant, to summary recovery of the balance under the Act (*t*). And as, from the

(*g*) C. C. R. 1903, O. 40, r. 7, where mode of service of such demand is indicated.

(*h*) *Id.*, indicating mode of proof of such service. (On order for short service a fee of 2s. 6d. is payable: see Treas. Order, Dec. 30th, 1903, Sched. B, par. 24.)

(*i*) See *id.*, referring to C. C. R. 1903, O. 40, r. 2 (*supra*, p. 741), as to time of service. A fee of 1s. is payable on filing (*ubi sup.*).

(*k*) See last note.

(*l*) C. C. R. 1903, O. 40, r. 7 (see Form 422 in App.). A fee of 5s. (and 4d. per folio for all copies of order which may have to be served beyond the first)

is payable to the registrar: Treas. Order, Dec. 30th, 1903, Sched. B, par. 24.

(*m*) Per Davey, L. J., in next-cited case.

(*n*) 46 & 47 Vict. c. 61, s. 24.

(*o*) *Farquharson v. Morgan*, [1894] 1 Q. B. 552.

(*p*) *Re Cundall & Vavasour*, 95 L. T. 483.

(*q*) 63 & 64 Vict. c. 50, s. 2 (3).

(*r*) *Supra*, p. 736.

(*s*) See C. C. R. 1903, O. 40, r. 7, *supra*, p. 743.

(*t*) Under the Act of 1883 this had been held otherwise: *In re Holmes & Formby*, [1895] 1 Q. B. 174.

beginning of the year 1909, "all questions which . . . under the contract of tenancy are referred to arbitration" are to be determined, as already seen (*u*), in accordance with the provisions of the Acts, and any sum awarded to be paid to be recoverable in manner provided by them for the recovery of compensation (*x*), the above difficulties are not likely hereafter to occur.

The "County Court" here spoken of throughout is that of the district where the holding or its larger portion is situated (*y*). It is empowered, if such a step is necessary to carry out the provisions of the Act, to appoint and change a guardian (*z*), on the application of any person interested, where the landlord or tenant is an infant without a guardian, or is of unsound mind not so found by inquisition (*a*), and to appoint and change a next friend where necessary (*b*) to a married woman (*c*). It is also provided that a woman (married before the 1st January, 1883), entitled for her separate use to land her title to which accrued before that date, and not restrained from anticipation, shall, for the purposes of the Act, be in respect of land as if she was unmarried; and that where any other woman married before that date is desirous of doing any act under the Act in respect of land her title to which accrued before that date, her husband's concurrence shall be requisite, and that she shall be examined apart from him, to ascertain if she is acting voluntarily, by the County Court or by the judge of the County Court for the place where she is for the time being (*c*).

The costs of and incidental to the arbitration and award are to be in the discretion of the arbitrator (or, where, before the end of the year 1908, two are appointed, the arbitrators or umpire (*d*)), who may direct to and by whom and in what manner those costs or any part of them are to be paid; they are, however, subject to taxation (*e*), on the application (*f*) of either party, by the registrar

(*u*) *Supra*, p. 736.

(*x*) 6 Edw. 7, c. 56, ss. 1 (2), 9.

(*y*) 46 & 47 Vict. c. 61, s. 61.

(*z*) As to mode of application, see C. C. R. 1903, O. 40, r. 1. A fee of 5s. is payable: Treas. Order, Dec. 30th, 1903, Sched. B, par. 24.

(*a*) Sect. 25.

(*b*) Now (owing to the provisions of the Married Women's Property Act) hardly ever the case.

(*c*) Sect. 26.

(*d*) 63 & 64 Vict. c. 50, 2nd sched. Pt. II. r. 14.

(*e*) A fee of 10s. is payable on taxation where the amount of the account to

be taxed does not exceed 50*l.*, and 10s. for every additional 50*l.* or fractional part of 50*l.*: Treas. Order, Dec. 30th, 1903, Sched. B, par. 24. Upon an application for the removal of an arbitrator or to set aside an award (*supra*, p. 738), the fee payable on taxation in every case is 5s.: *id.*

(*f*) Such application must be in writing, stating on whose behalf it is made, four clear days' notice of the time and place of taxation being given by the registrar under the seal of the Court to the applicant and to the parties whose costs are to be taxed, and requiring the parties to attend and be examined:

of the County Court, such taxation being itself subject (*g*) to review by the judge (*h*). In awarding costs it is provided that the arbitrator (or, where, before the end of the year 1908, two are appointed, the arbitrators or umpire (*i*)) shall take into consideration the reasonableness or unreasonableness of the claim of either party, either in respect of amount or otherwise, and any unreasonable demand for particulars, or refusal to supply particulars, and generally all the circumstances of the case; and may disallow the costs of any witness whom he considers to have been called unnecessarily, and any other costs which he considers to have been incurred unnecessarily (*k*). It will be noticed that the arbitrator's control over costs is somewhat wider than under the Act of 1883 (*l*), under which it was held that he had no power to fix the scale on which they should be taxed (*m*); and it is now provided that such costs shall be taxed according to such one of the scales of costs applicable to actions in the County Court as the arbitrator shall direct, and in default of such direction under column B of such scales (*n*). Costs of proceedings in the County Court under the Act are in the discretion of the Court, it being provided that they shall be taxed according to such one of the scales of costs applicable to actions in the County Court as the judge shall direct, and in default of direction under column B of those scales (*o*).

The Act further contains clauses (*p*) enabling holdings to be charged with the sums expended in the payment of compensation either under its provisions or (so long as the improvement in respect of which it is paid is one comprised in the schedule of the Act (*q*)) under custom, agreement or otherwise (*r*). A landlord on paying to the tenant the amount due to him for compensation (or on expending himself after notice from the tenant the amount necessary for drainage works (*s*)) is entitled to obtain from the Board of Agriculture (*t*) a charge for repayment of such amount

C. C. R. 1903, O. 40, r. 5. A fee of 2s. 6d. is payable for such notice by the applicant: Treas. Order, Dec. 30th, 1903, Sched. B, par. 24.

(*g*) On application in writing in accordance with the rules for the time being in force as to interlocutory applications: C. C. R. 1903, O. 40, r. 6; O. 53, r. 47.

(*h*) 63 & 64 Vict. c. 50, 2nd sched. Pt. I. r. 14.

(*i*) 2nd sched. Pt. II. r. 14.

(*k*) 2nd sched. Pt. I. r. 15.

(*l*) Sect. 20.

(*m*) *In re Griffiths & Morris*, [1895] 1 Q. B. 866.

(*n*) Lord Chancellor's Order of Nov. 27th, 1900, r. 2. (As to the scales, see App. to C. C. R. 1903, Pt. IV.)

(*o*) *Id.*, r. 1. These rules are made under 46 & 47 Vict. c. 61, s. 27.

(*p*) Sects. 29–32.

(*q*) See *supra*, p. 729, at note (*p*).

(*r*) 63 & 64 Vict. c. 50, s. 3 (3).

(*s*) Under 46 & 47 Vict. c. 61, s. 4; *supra*, p. 733.

(*t*) In substitution for the County Court: 63 & 64 Vict. c. 50, s. 3 (1).

on the holding or any part thereof (*u*). And where the landlord is only tenant for life, his executors on paying a claim for compensation made before his death may obtain a charge on the holding to the amount so paid (*x*). For, though they are not within the definition of a "landlord" given in the Act (*y*), it is specially directed (*z*) that that designation shall continue, until the conclusion of any proceedings taken under the Act, to be applied to the "parties,"—a term which includes, not merely the parties to the contract of tenancy, but the parties to any proceedings initiated and intended to be carried to a conclusion under the Act (*a*). Such charge is to be for the landlord's interest therein and for all interests therein subsequent to his own; so that, however, it do not extend beyond the interest of himself, his executors, administrators, and assigns in the tenancy where he is himself a tenant (*b*) of the holding (*c*).

The person making the award is, at the request and cost of the party entitled to obtain the charge, to certify the amount to be charged and the term for which the charge may properly be made, having regard to the time at which each improvement in respect of which compensation is awarded is deemed to be exhausted (*d*); and the Board of Agriculture, on proof of the landlord's payment or (in the case of drainage) of his expenditure, and on being satisfied of the observance in good faith by the parties of the conditions imposed by the Act, is to make an order charging the holding or any part thereof with repayment (*e*). The amount of interest and of the instalments with and by which such repayment is made is to be settled by the Board and charged (with such directions for giving effect to the charge as the Board thinks fit) in favour of the landlord, his executors, administrators, and assigns (*f*); but where the landlord obtaining the charge is not absolute owner of the holding for his own benefit, no instalment or interest is to be made payable after the time when the improvement for which compensation is paid will, in the opinion of the Board, after hearing such evidence (if any) as it thinks expedient, have become exhausted (*g*). The creation of such a charge

(*u*) Sect. 29.

(*x*) *Gough v. Gough*, *infra*.

(*y*) Sect. 61.

(*z*) See p. 727, *supra*.

(*a*) *Gough v. Gough*, [1891] 2 Q. B. 665.

(*b*) Defined in sect. 61; *supra*, p. 727.

(*c*) Sect. 30.

(*d*) 63 & 64 Vict. c. 50, s. 3 (2).

(*e*) 46 & 47 Vict. c. 61, s. 29. The charge is a land charge within the Land Charges Registration Act, 1888 (51 & 52 Vict. c. 51), and may be registered accordingly: 63 & 64 Vict. c. 50, s. 3 (4).

(*f*) 46 & 47 Vict. c. 61, s. 29.

(*g*) *Id.*, as modified by 63 & 64 Vict. c. 50, s. 12.

by the landlord will in no case render his estate liable to forfeiture (*h*).

Where the landlord is only a trustee or entitled otherwise than for his own benefit, the amount of compensation is not recoverable against him personally (whether it be compensation given directly by the Act or authorized to be substituted (*i*) for compensation under the Act), but is to be a charge (*k*) on the holding only (*l*); and he may, either before or after paying it to the tenant, obtain from the Board of Agriculture a charge on the holding to the amount in question (*l*). But if he fail to pay the tenant the amount due within a month after the latter's quitting, the tenant is to be entitled to obtain from the Board, in favour of himself, his executors, administrators, and assigns, a charge on the holding (in like manner and form as in case of a charge obtainable by the landlord) to the amount of the sum due and the costs incurred in obtaining the charge or in raising the amount due thereunder (*l*). All charges made under the Act may be assigned (on any terms to be agreed on) to companies incorporated by Parliament who have power to advance money for the improvement of land, and may be re-assigned by them to any persons whatever (*m*). A charge created in respect of an improvement of the first or second class may be discharged by the application of capital money arising under the Settled Land Act, 1882 (*n*).

For the particular sections of the Act dealing with Crown and Duchy lands (*o*), and Ecclesiastical and Charity lands (*p*), the Act itself must be consulted.

It is specifically provided that the Act of 1883 shall apply to the tenancy created by the compulsory hiring of land to a parish council for the purpose of being let by the council in allotments (*q*); but for the assessment of compensation a single arbitrator is to be appointed under the provisions of the Allotments Act (*r*). And as the Acts of 1883 and 1900, as already seen, are to be construed as

(*h*) 46 & 47 Vict. c. 61, s. 29.

(*i*) Under sects. 3, 4, 5; *supra*, pp. 732—734.

(*k*) This charge, if in respect of improvements of the first or second class, was, by stat. 53 & 54 Vict. c. 57, s. 3, directed to be registered under the Land Charges Registration Act, 1888 (51 & 52 Vict. c. 51). But as all charges made by the Board of Agriculture under the Agr. H. Act are now within the L. C. R. Act (see *supra*), the

italicized words may apparently be omitted.

(*l*) 46 & 47 Vict. c. 61, s. 31.

(*m*) Sect. 32.

(*n*) 45 & 46 Vict. c. 33. See 46 & 47 Vict. c. 61, s. 29.

(*o*) Sects. 35—37.

(*p*) Sects. 38—40.

(*q*) 56 & 57 Vict. c. 73, s. 10 (7). See *ante*, p. 73.

(*r*) 50 & 51 Vict. 48, s. 3 (4).

one, it would appear that, except as to the appointment of the arbitrator, the procedure of the later Act would have to be followed.

II.—*Under the Allotments Compensation Act (s).*

Since the Agricultural Holdings Act was passed, an Act has been added to the statute-book under which also a tenant may, upon the determination of his holding, become entitled to the payment of compensation from his landlord.

The provisions of this Act (*t*) apply to the holders for any term of allotments—*i.e.*, parcels of land of not more than two acres in extent held by a tenant under a landlord, and cultivated as a garden or as a farm, or partly as a garden and partly as a farm (*u*),—or cottage gardens—*i.e.*, allotments attached to a cottage (*u*). But a piece of land (of less than the specified size) upon which fruit, vegetables, and flowering plants are grown, and which is cultivated, not for food or pleasure, but by a seedsman or market gardener for the purposes of business, is not “cultivated as a garden” within the meaning of the above definition, and is therefore not an allotment within the Act (*x*). The provisions of the Act now in question are, in any case of conflict, to prevail over those of the Agricultural Holdings Act; and no claim for compensation can be made under that Act for any matter in respect of which a claim is made under this Act (*y*).

The Act provides (*z*) that upon the determination of a tenancy (*i.e.*, the cesser of a contract of tenancy by effluxion of time or from any other cause (*a*)) after the commencement of the Act (*b*), the tenant, or the legal personal representative of a deceased tenant (*c*), shall be entitled, notwithstanding any agreement to the contrary, to obtain from the landlord (*i.e.*, the person for the time being entitled to receive the rents and profits of the holding (*d*)) compensation as follows:—(*a*) For crops, including fruit growing upon the holding in the ordinary course of cultivation, and for fruit trees and fruit bushes growing thereon, which have been planted by the tenant with the previous consent in writing of the landlord; (*b*) for labour expended upon and for manure

(*s*) 50 & 51 Vict. c. 26.

(*t*) The Act does not apply to the metropolis: sect. 2.

(*u*) Sect. 4.

(*x*) *Cooper v. Pearse*, [1896] 1 Q. B. 562.

(*y*) Sect. 18.

(*z*) Sect. 5.

(*a*) Sect. 4.

(*b*) Jan. 1st, 1888: sect. 3.

(*c*) Sect. 4.

(*d*) *Id.*

applied to the holding since the taking of the last crop therefrom in anticipation of a future crop; (e) for drains and for any out-buildings, pigsties, fowl-houses, or other structural improvements made by the tenant upon his holding with the written consent of his landlord. Any sum, however, due to the landlord in respect of rent, or of any breach of the contract of tenancy or wilful or negligent damage committed or permitted by the tenant, is to be taken into account in reduction of the amount payable (e).

The Act then, like the Agricultural Holdings Act, goes on to provide, in successive clauses, a procedure by which the amount of compensation payable is to be ascertained and its payment enforced. If the parties cannot agree upon the amount and time of payment, the difference is to be settled by an arbitrator (f), and such arbitrator may by agreement be jointly appointed by them within twenty-eight days after the determination of the tenancy (g). In the absence of such agreement, either party may apply personally or in writing to the justices in petty sessions of the district, who shall appoint as arbitrator one of their own number, or some other competent person, not interested in the holding; and a second arbitrator is to be appointed in the same manner if before award the person appointed die or become incapable of acting or fail to act for seven days after his appointment (g). The arbitrator (who is to act without remuneration, or, where no arbitrator willing so to act can be obtained, upon payment of such moderate sum as the justices consider will reasonably remunerate him for his time and expenses (h)) is to proceed to determine the difference referred to him within seven days after his appointment (i). Authority is conferred upon him to call for the production of any document he considers necessary which is in the possession or power of either party (k), to examine on oath parties and witnesses (who are punishable for perjury (l)), and to proceed in the absence of either of the parties after notice given to both (m).

The award—which is to be final and conclusive in every case, and cannot be made a rule of any court, or be removable by any process into any court (n)—must be made by the arbitrator in

(e) Sect. 6. The compensation must be made in money: sect. 5.

(f) Sect. 7.

(g) Sect. 8.

(h) Sect. 9.

(i) Sect. 10.

(k) Sect. 11.

(l) *Id.*

(m) Sect. 12.

(n) Sect. 16. The two latter of these provisions apply also to the submission to arbitration: *id.*

writing signed by him, and be ready for delivery within fourteen days after his appointment, or within such extended time, not exceeding in the whole twenty-eight days after his appointment, as the parties may agree upon in writing (*o*); and it must fix a day not sooner than fourteen days after its delivery for the payment of the money awarded for compensation, costs, or otherwise (*p*). The costs of and attending the arbitration (including the remuneration, if any, of the arbitrator) are to be paid by the parties in such proportion as he thinks just; and the award may direct the payment of the whole or any part of them by the one party to the other, or may declare that no costs shall be payable (*q*). Where any money is not paid within fourteen days after the time when it is awarded (or agreed) to be paid for compensation, costs, or otherwise, it may be recovered upon order made by the County Court judge of the district, as money is recoverable which is ordered to be paid by a County Court under its ordinary jurisdiction (*r*). The application for such an order (when money is *awarded* to be so paid) must be made in exactly the same way as an application for a similar order under the Agricultural Holdings Act (*s*); and where money is *agreed* to be so paid, proceedings for its recovery, as under that Act, are by action commenced in the ordinary way (*t*).

Where, however, an allotment is let by a district or parish council in pursuance of the Allotments Act, 1887 (*u*), and the tenancy is determined, under the provisions of that Act (*x*) (by reason of the tenant being in arrear with his rent for forty days, or of his not having observed after the lapse of three months of the tenancy the regulations affecting the allotment, or of his residing more than one mile out of the district or parish for which the allotments are provided), the compensation due to him as an outgoing tenant, which in default of agreement between him and an incoming tenant the council shall in every such case pay to him on demand, is to be assessed by an arbitrator appointed by the council (*y*). But the tenant may, if he so desire, have such compensation assessed by an arbitrator appointed either under the

(*o*) Sect. 13.

(*p*) Sect. 15.

(*q*) Sect. 14.

(*r*) Sect. 17.

(*s*) C. C. R. 1903, O. 40, r. 7, and Form 421 in App.; *supra*, p. 743. The same fee of 2s. 6d. is payable on filing

the application: Treas. Order, Dec. 30th, 1903, Sched. B, par. 24.

(*t*) C. C. R. 1903, O. 40, r. 8; *supra*, p. 743.

(*u*) 50 & 51 Vict. c. 48; see *ante*, p. 54.

(*x*) Sect. 8, sub-s. (2); see *ante*, p. 650.

(*y*) Sect. 8, sub-s. (2).

Allotments Compensation Act (z), or by proceedings under the Agricultural Holdings Act (a). And it is further provided (b) that "upon the recovery of an allotment from any tenant, the Court or justice directing the recovery may stay delivery of possession until payment of the compensation, if any, due to the outgoing tenant has been made or secured to the satisfaction of the Court or justice."

III.—*Under the Tenants' Compensation Act (c).*

Lastly, there has to be considered an important extension of the principle of the two foregoing Acts to the case of land under mortgage.

By the Tenants' Compensation Act, 1890, to be construed (d) as one with the Agricultural Holdings Act, 1883, and the Allotments Compensation Act, 1887 (referred to in the Act in question as the principal Acts), it is provided as follows (e):—

"Where a person occupies land under a contract of tenancy with the mortgagor, whether made before or after the passing of this Act (f), which is not binding on the mortgagee of such land (g), then—

"(1) The occupier shall, as against the mortgagee who takes possession, be entitled to any compensation which is, or would but for the mortgagee taking possession be, due to the occupier from the mortgagor as respects crops, improvements, tillages, or other matters connected with the land, whether under the principal Acts, or the custom of the country, or agreements sanctioned by the principal Acts;

"Provided that any sum ascertained to be due to the occupier for such compensation, or for any costs connected therewith, may be set off against any rent or other sum due from him in respect of the land, and recovered as compensation under the principal Acts, but unless so set off shall, as against the mortgagee, be charged and recovered in accordance only with sect. 31 of the Agricultural Holdings Act, 1883 (h), as if the mortgagee were the landlord within the meaning of that section.

"(2) Before the mortgagee deprives the occupier of possession of the land otherwise than in accordance with the said contract,

(z) 50 & 51 Vict. c. 26; *supra*, p. 749.

(a) 46 & 47 Vict. c. 61; *supra*, p. 734.

(b) 50 & 51 Vict. c. 48, s. 8, sub-s. (3).

(c) 53 & 54 Vict. c. 57.

(d) Sect. 1.

(e) Sect. 2.

(f) 18th August, 1890.

(g) See *ante*, p. 58.

(h) *Supra*, p. 748.

he shall give to the occupier six months' notice in writing of his intention so to deprive him, and if he so deprives him compensation shall be due to the occupier for his crops, and for any expenditure upon the land which he has made in the expectation of holding the land for the full term of his contract of tenancy, in so far as any improvement resulting therefrom is not exhausted at the time of his being so deprived; and such compensation shall be determined in like manner as compensation under the principal Acts, and shall be set off, charged, and recovered in manner before provided in this section. This sub-section shall only apply where the said contract is for a tenancy from year to year, or for a term of years not exceeding twenty-one at a rack-rent" (2).

(2) This sub-section has already been referred to: *ante*, p. 61.

CHAPTER II.

RIGHTS AND REMEDIES OF THE LANDLORD.

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Delivery of possession.—Subject to any stipulation or local custom to the contrary (*a*), and subject to the right conferred upon him in lieu of emblements by statute (*b*), the duty of the tenant upon the determination of the tenancy in one of the modes already explained is simply to yield up peaceable and complete possession of the premises demised to him, together with all fixtures except those which he is entitled to remove (*c*); and after entry and demand of possession by the landlord, or any act upon such entry showing an intention to resume possession, both the tenant and all persons claiming under him are liable to be treated as trespassers (*d*). This duty will be implied in law if not expressed in the contract between the parties, and the tenant will not discharge it by merely going out of possession, unless he restore possession to the landlord (*e*). It follows that if he has underlet the whole or any portion of the premises, he will be liable for a breach of

(a) See *ante*, p. 716.

(b) *Ante*, p. 715.

(c) *Ante*, pp. 690 *et seq.*

(d) *Hey v. Moorhouse*, 6 Bing. N. C. 52. It has already been pointed out (*ante*, p. 600), that if there has been

no assent to the holding over, so as to displace the tenancy at sufferance which is inferred from that fact, ejectment may be maintained without entry or even a demand of possession.

(e) Per Blackburn, J., in next-cited case.

this obligation if his sub-tenant refuse or neglect to give up possession when the term ends (*f*).

Encroachments.—The above principle applies even to *encroachments* which (forming no part of the lands as demised) have been made by the tenant from waste land adjoining them; for as it is presumed that such encroachments (*g*) are part of the holding (*h*), he must render them up as such at the end of the term (*i*), whether he has directly undertaken to do so (*k*) or not (*l*). Nor need such encroachments actually adjoin the demised premises (*m*) so long as they are adjacent thereto (*n*): the intervention, for instance, of a road (*o*), or of a small river, a fence, and strip of waste (*p*), will make no difference, provided it appear that the tenant gained the opportunity of annexing the encroachment by reason of its proximity to the demised land (*p*). It is also immaterial whether the encroachment is made upon land belonging to the landlord or not (*q*) (though the presumption holds only as between landlord and tenant, and will not prevail for the landlord's benefit against third persons (*r*)), and whether it has been made with or without his assent (*s*). The doctrine, too, applies irrespective of the amount of the tenant's interest—whether it be a life interest (*t*), or a term of years (*u*), or merely a tenancy from year to year (*x*).

The presumption, however, which, it may be remarked, applies only to encroachments made by the tenant after the commencement of his tenancy (*y*), may always be rebutted by evidence (*z*), from which it may appear that the tenant, by some act done at the

(*f*) *Henderson v. Squire*, L. R. 4 Q. B. 170.

(*g*) *Hastings (Lord) v. Saddler*, 79 L. T. 355, shows that the doctrine is restricted to those made from waste.

(*h*) *Andrews v. Hailes*, 2 E. & B. 349.

(*i*) As to rights of action in respect thereof against him during the term, see *Tabor v. Godfrey*, 64 L. J. Q. B. 245.

(*k*) *Doe v. Jones*, 15 M. & W. 580.

(*l*) *Kingmill v. Millard*, 11 Exch. 313, per Parke, B. *Doe v. Mulliner*, 1 Esp. 460, where Lord Kenyon expressed the contrary opinion, is no longer of authority.

(*m*) *Doe v. Davies*, 1 Esp. 461; *Kingmill v. Millard*, *ubi sup.*

(*n*) *Hastings (Lord) v. Saddler*, *supra*, per Wills, J. The subject of the demise here was an island, and that of the encroachment two gardens on the main-

land, distant from the island (which was accessible on foot at low water) by more than half a mile.

(*o*) *Andrews v. Hailes*, *supra*; *Doe v. Jones*, *supra*.

(*p*) *Lisburne (Lord) v. Davies*, L. R. 1 Q. B. 259.

(*q*) *Whitmore v. Humphries*, L. R. 7 C. B. 1, per Willea, J.; *Kingmill v. Millard*, *supra*.

(*r*) *Doe v. Massey*, 17 Q. B. 373.

(*s*) *Whitmore v. Humphries*, *supra*.

(*t*) *Bryan v. Winwood*, 1 Taunt. 208; *Doe v. Jones*, *supra*; *Doe v. Tidbury*, 14 C. B. 304; *Kingmill v. Millard*, *supra*.

(*u*) *Whitmore v. Humphries*, *supra*.

(*x*) *Andrews v. Hailes*, *supra*.

(*y*) *Dizon v. Baty*, L. R. 1 Ex. 259.

(*z*) *Doe v. Williams*, 7 C. & P. 332; *Doe v. Tidbury*, *supra*, per Jervis, C. J.

time of making the encroachments, intended them for his own benefit and not to hold them as he held the lands to which they were adjacent (*a*). And the same result will hold where the act relied upon is only done afterwards (*b*), provided such act have the effect of disclaiming the landlord's title to the encroachment (*e.g.*, making a conveyance of it to another person), and it be brought to the landlord's knowledge (*c*): a condition, however, which is not fulfilled when such a conveyance has neither been delivered nor followed by possession (*d*). So a subsequent grant, by the landlord to the tenant, of the original tenement by a description which clearly does not include the encroachment excludes the presumption that the latter was made as an accretion to the original holding (*e*). But as this result is founded on the principle that the presumption of accretion is rebutted if, on the facts proved in a particular case, the landlord and tenant appear to have so conducted themselves as to show that the former treated the encroachment as not enuring for his benefit (*f*), it will not apply where he is not in a position to include it in the subsequent grant, as in the case where it is comprised in an outstanding lease which has been granted by the lessor to a third party entitled as against him to assert his right to it (*g*).

Where, from the conditions above laid down not being fulfilled, no presumption of the kind mentioned can arise, the question, in the case where the tenant during his term takes possession of land belonging to his landlord, is one purely of fact—Did he occupy it as a mere extension of the *locus* of his tenancy, or did he take possession, not as tenant, but with the object or desire simply of benefit to himself, and so as to acquire the ownership of the land occupied under the Statute of Limitations (*h*)?

Damages.—The measure of damages upon a breach by the tenant of the obligation to deliver possession of the premises at the determination of the term is not necessarily their value, but only the real damage sustained by the landlord (*i*). Such damage, however, may include the reasonable damages and costs to which the latter may have become liable by reason of his failure, in consequence

(*a*) *Doe v. Rees*, 6 C. & P. 610.

(*b*) *Berney v. Bickmore*, 8 L. T. 353.

(*c*) *Kingsmill v. Millard*, 11 Exch. 313, per Parke, B.

(*d*) *Doe v. Jones*, 15 M. & W. 580.

(*e*) *Att.-Gen. v. Tomline*, 15 Ch. Div. 150.

(*f*) *Id.*, per Theaiger, L. J.

(*g*) *East Stonehouse Urban Council v Willoughby*, [1902] 2 K. B. 313.

(*h*) *Hastings (Lord) v. Saddler*, 79 L. T. 355, per Lord Russell, C. J.

(*i*) *Watson v. Lane*, 11 Exch. 763, per Martin, B.

of the tenant's act, to deliver possession to a third person under a new contract of tenancy with him (*k*), or the costs of ejecting a person who has come in under the tenant, and whom the latter has failed to get out of possession at the end of the term (*l*).

Remedies.—The four courses which (in addition to the above action for damages) are open to the landlord if the tenant holds over have already been specified (*m*). These have now to be considered *seriatim*.

DIV. I.—RECOGNITION OF TENANCY AS CONTINUING.

If the landlord assent to his remaining in possession, the tenant upon holding over becomes, as already explained, first, a tenant at will (*n*), and afterwards, upon payment and acceptance of rent, a tenant from year to year, presumably upon such of the terms of the former tenancy as are applicable to a tenancy of that nature (*o*). The presumption, as already stated, is one which may be displaced (*o*); and where a landlord gave his tenant a notice to quit at a specified day, "or in default thereof" to pay a stipulated increased rent (*p*), adding that if he continued to occupy he would be considered as agreeing to pay that rent, it was held (*q*) that by continuing in possession he must be taken to have acquiesced in the proposal to pay it (*r*).

The liability of the tenant for rent by the mere fact of holding over (by himself or another) has been already discussed (*s*).

DIV. II.—DOUBLE VALUE AND DOUBLE RENT.

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SECT. 1.—DOUBLE VALUE.

This is a remedy given to the landlord when a tenant wilfully holds over demised premises after a written demand of possession

(*k*) *Bramley v. Chesterton*, 2 C. B. N. S. 592.

(*l*) *Henderson v. Squire*, L. R. 4 Q. B. 170.

(*m*) *Ante*, p. 689.

(*n*) See, however, as to lettings for a year, &c., *ante*, p. 394.

(*o*) *Ante*, pp. 395-7.

(*p*) See, as to notices of this kind, *ante*, p. 619.

(*q*) *Roberts v. Hayward*, 3 C. & P. 432.

(*r*) The notice, however, seems to have been clearly invalid by reason of not being expressed to expire at the proper time. See *ante*, pp. 609, 619.

(*s*) *Ante*, p. 403.

by the landlord. It is provided by statute (*t*) that "in case any tenant or tenants, for any term of life, lives, or years, or other person or persons who are or shall come into possession of any lands, tenements, or hereditaments, by, from, or under, or by collusion with such tenant or tenants shall wilfully hold over any lands, tenements, or hereditaments after the determination of such term or terms, and after demand made and notice in writing given for delivering the possession thereof, by his or their landlords or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements, or hereditaments shall belong, his or their agent or agents thereunto lawfully authorized, then and in such case such person or persons so holding over shall, for and during the time he, she, and they shall so hold over, or keep the person or persons entitled out of possession of, the said lands, tenements, and hereditaments as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators, or assigns, at the rate of double the yearly value of the lands, tenements, and hereditaments so detained, for so long time as the same are detained, to be recovered in any of his Majesty's Courts of record by action of debt." And the statute further directs that no relief shall be given in equity against the recovery of this penalty.

The effect and application of the above enactment, which is one of a penal character (though often spoken of also as "remedial"), and therefore to be strictly construed (*u*), may be considered under the following heads:—

What tenancies.—The terms specifically mentioned in the statute are those "of life, lives, or years," so that it does not apply to weekly tenancies (*u*), nor (it seems probable (*u*)) to quarterly tenancies (*x*). It applies, however, apparently to a tenancy from year to year (*y*), and (as it has been held) to a tenancy for a year certain (*z*).

What holding over.—The statute only applies to the case of a tenant who holds over contumaciously,—i.e., who holds over though

(*t*) 4 Geo. 2, c. 28, s. 1.

(*u*) *Lloyd v. Rosbee*, 2 Camp. 453, per Lord Ellenborough, C. J.

(*x*) See *Wilkinson v. Hall*, 3 Bing. N. C. 508, where the point was left undecided. In *Kemp v. Derrett*, 3 Camp. 510, it was sought, and successfully, on the part of the plaintiff, to establish a quarterly tenancy; but the notice was invalid. See *infra*, at note (*t*).

(*y*) See *Ryal v. Rich*, 10 East, 48; *Lake v. Smith*, 1 N. B. 174. In neither of these cases, nor in *Page v. More*, *infra* (decided in favour of the tenant on other grounds), does the point seem to have been discussed.

(*z*) *Cobb v. Stokes*, 8 East, 358. The point, however, was not taken.

he is conscious that he has no right to retain possession (*a*): and not where no fraud is intended and resistance to its resumption by the landlord is made under a fair claim of right (*b*). Where, however, the only ground for such claim was a local custom which clearly did not apply to the demised premises, it was held that the case fell within the statute (*c*). It follows from the above principle that a tenant cannot be made liable for double value in consequence of the holding over of his sub-tenant (*d*), or (as it would seem) of a joint tenant (*e*), without proof that such holding over has taken place with his assent or authority.

What notice.—Although the statute speaks of a “demand made and notice in writing given,” it is settled that no demand beyond that conveyed by the notice itself is necessary (*f*). And an ordinary notice to quit will suffice for this purpose in yearly tenancies, even though possession, according to the general form of such notice (*g*), may not be demanded thereby for any one definite day and no other (*h*); but such notice must be a notice which is in itself valid and sufficient to determine the tenancy (*i*). Similarly, where the tenancy is for a fixed term, so that no notice to quit is necessary at all (*k*), a notice given shortly before its expiration, and expressed to be simply a notice to quit, will be sufficient to satisfy the statute (*l*). The notice, however, though valid if given before the end of the term (*m*), may also be given afterwards, provided the landlord has done no act in the meantime to recognise the continuance of the tenancy (*n*); but he will in that case only be entitled to double value calculated from the date of the notice instead of from the expiration of the term, and he will lose even his ordinary rent for the intervening period (*n*). A notice under which double value becomes payable is not waived by the delivery, after such liability has arisen, of a second notice “to quit (on a subsequent day) or to pay double rent,” and double value under it will therefore still be payable (*o*).

(*a*) *Swinfen v. Bacon*, 6 H. & N. 846.

(*b*) *Wright v. Smith*, 5 Esp. 203.
(The marginal note of this case is incorrect.)

(*c*) *Hirst v. Horn*, 6 M. & W. 393.

(*d*) *Rands v. Clark*, 19 W. R. 48.

(*e*) See *Hirst v. Horn*, *supra*. The point was not decided.

(*f*) *Wilkinson v. Colley*, 5 Burr. 2694.

(*g*) *Ante*, p. 616.

(*h*) *Hirst v. Horn*, *supra*.

(*i*) *Page v. More*, 15 Q. B. 684; *Kemp v. Derrett*, *supra*.

(*k*) *Ante*, p. 600.

(*l*) *Messenger v. Armstrong*, 1 T. R. 53. The action is spoken of in the report as one for double rent in error.

(*m*) *Outling v. Derby*, 2 W. Bl. 1075.

(*n*) *Cobb v. Stokes*, 8 East, 358. The interval here was one of nearly two months.

(*o*) *Messenger v. Armstrong*, *supra*. Cf. *ante*, p. 626.

The statute provides that notices under it may be given by agents for the landlord, if "thereunto lawfully authorized." A receiver, for instance, appointed by the High Court to let the premises (subject to its approval) and receive rents (*p*), and an agent appointed by the parties to a mortgage deed to let, to receive and recover rents, and to give notices to quit (*q*), have such authority on behalf of the reversioner.

Procedure.—The procedure for recovering double value specified by the statute is that of an action of debt, which, under the Statute of Limitations applicable to the matter, must be brought (as it is for a penalty) within two years of the accrual of the cause of action (*r*). Double value cannot be distrained for (*s*). Where the sum claimed does not exceed 100*l.* (*t*), such action may be brought in the County Court (*u*).

What plaintiffs.—The action may be brought by the landlord or other person (standing in his place) entitled to the reversion (*x*), *i.e.*, the immediate reversion (*y*): by a mortgagee, for instance (as assignee of the reversion (*z*)), but not by a proposed new lessee whose term should have commenced on the expiration of the tenancy held over (*a*). An executor of the lessor is by its terms within the statute, but (according to the usual rule) not an administrator of such executor who has not taken out administration *de bonis non* (*b*), even though the tenant may have attorned to him (*c*). One tenant in common may maintain the action in respect of his moiety (*d*).

What defendants.—The action need not necessarily be brought against a person who at the time stands to the plaintiff in the relation of tenant, and it will lie against a person whom the landlord has elected to treat, not as a tenant, but as a trespasser, by bringing ejectment against him (*e*). Under the present practice, however, a claim for double value can be joined, even without leave being

(*p*) *Wilkinson v. Colley*, 5 Burr. 2694.

(*q*) *Poole v. Warren*, 8 A. & E. 582.

(*r*) 3 & 4 Will. 4, c. 42, s. 3. As to discovery in the action, see *post*, p. 783.

(*s*) See *Timmins v. Rowlinson*, 3 Burr. 1603, per Wilmot, J.

(*t*) 51 & 52 Vict. c. 43, s. 56, as extended by 3 Edw. 7, c. 42, s. 8.

(*u*) *Wickham v. Lee*, 12 Q. B. 521.

(*x*) *Blatchford v. Cole*, 5 C. B. N. S. 514.

(*y*) *Harcourt v. Wyman*, 3 Exch. 817, per Parke, B.

(*z*) *Poole v. Warren*, *supra*.

(*a*) *Blatchford v. Cole*, *supra*.

(*b*) 1 Wms. Exors. 180 (10th ed.).

(*c*) *Tingrey v. Brown*, 1 B. & P. 310.

(*d*) *Cutting v. Derby*, 2 W. Bl. 1075; *Wilkinson v. Hall*, 3 Bing. N. C. 508.

(*e*) *Soulby v. Nering*, 9 East, 310.

obtained, with a claim for the recovery of land (*f*), and should be so joined where it is desired to pursue both those remedies; otherwise all costs of the second action would probably be thrown upon the landlord, even if such action were not restrained as an abuse of the process of the Court, by reason of the attempt to divide a remedy where there is a complete remedy in the Court where the proceedings were commenced (*g*). Moreover, the action should (if the statutory conditions are fulfilled) be brought against the person in whose possession the land is when the time for delivering the possession arrives, and such person need not *necessarily* be the same as the one to whom the notice has been given (*h*).

Damages.—The penalty imposed by the statute is that of payment “at the rate of double the yearly value of the lands, tenements, and hereditaments” held over,—not necessarily double the *rent*, for this might not afford an equivalent compensation (*i*). For this purpose the value of the soil itself and of everything which by having been attached to it becomes part of the soil, as well as that of all easements, rights, and appurtenances belonging thereto or enjoyed therewith, is to be taken into account; *i.e.*, what an occupier would give, and the landlord would otherwise have received, for the use of the freehold and everything connected with it during the time that the possession was withheld (*k*). But where compensation is paid jointly for the use of the tenement and its appurtenances *and for something else* (*e.g.*, for a room in a mill and for a supply of power from a steam engine), the value of the latter cannot be taken into account in calculating double the value of the “lands, tenements, and hereditaments” under the statute (*l*).

Double value under the statute is only payable “for and during the time” of holding over; and where more is claimed apportionment of the proper sum is for the jury (*m*).

Waiver.—The right to double value may be waived by the landlord (*n*). If after it has accrued he accepts the single rent, it is

(*f*) R. S. C. 1883, O. 18, r. 2; *post*, p. 769.

(*g*) See *Williams v. Hunt*, [1905] 1 K. B. 512.

(*h*) See *Lake v. Smith*, 1 N. B. 174; where, however, the demand had been made on the *wife* of the defendant before her marriage.

(*i*) *Timmins v. Roulinson*, 3 Burr. 1603, per Wilmot, J.

(*k*) Per Parke, B., in next-cited case.

(*l*) *Robinson v. Learoyd*, 7 M. & W. 48.

(*m*) *Anon.*, Lofft, 275, where the action is spoken of as one for double rent apparently in error.

(*n*) *Rawlinson v. Marriott*, 16 L. T. 207.

a question of fact whether such rent has been received in part satisfaction of the claim to double value or as a waiver of it (*o*).

Div. II.—DOUBLE VALUE AND DOUBLE RENT—(*continued*).

SECT. 2.—DOUBLE RENT.

This is a remedy given to the landlord when a tenant holds over demised premises after having given a notice to quit. It is provided by statute (*p*) that "in case any tenant or tenants shall give notice of his, her, or their intention to quit the premises by him, her, or them holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then the said tenant or tenants, his, her, or their executors or administrators, shall from thenceforward pay to the landlord or landlords, lessor or lessors, double the rent or sum which he, she, or they should otherwise have paid, to be levied, sued for, and recovered at the same times and in the same manner as the single rent or sum before the giving such notice could be levied, sued for, or recovered; and such double rent or sum shall continue to be paid during all the time such tenant or tenants shall continue in possession as aforesaid."

This enactment, unlike the former, applies to *any* tenancy (even to one created merely by parol (*q*)) which the tenant has power (*r*) to determine by notice (*s*); and apparently to any holding over, whether "wilful" or not. Unlike the former, too, it enables (by its very language) sums recoverable under it to be recovered by distress (*t*) as well as by action, for it contemplates the continuance of the relation of landlord and tenant between the parties (*u*). Nevertheless, as it stipulates in terms that double rent shall only be paid during the time the tenant continues in possession, it has been held that a tenant holding over and paying such double rent for a year may quit at the end of the year without giving fresh notice (*x*).

(*o*) See *Ryal v. Rich*, 10 East, 48.

(*p*) 11 Geo. 2, c. 19, s. 18.

(*q*) *Timmins v. Rowlinson*, 3 Burr. 1603.

(*r*) See the preamble to the section.

(*s*) *Johnstone v. Huddestone*, 4 B. & C. 922. (*Sullivan v. Bishop*, 2 C. & P. 359, where it was held not to apply to a weekly tenancy, may probably now be

considered as of no authority: see Bullen, *Distress*, 135 (2nd ed.).)

(*t*) Cases just cited, and *Humberstone v. Dubois*, 10 M. & W. 765.

(*u*) See *Soulsby v. Newing*, 9 East, 310, per Lord Ellenborough, C. J. That this is different in the case of double value, see *ante*, p. 760.

(*x*) *Booth v. Macfarlane*, 1 B. & Ad. 904.

The notice given by the tenant must, for the statute to apply, be a valid notice: not necessarily in writing (*y*), but sufficient to determine the tenancy, and binding upon both parties at the time it is given (*z*). Hence a notice that he will quit upon a mere contingency will not render him liable for double rent under the statute, if he fail to quit when the contingency happens (*a*).

DIV. III.—RE-ENTRY WITHOUT LEGAL PROCESS.

If the landlord desire to re-enter summarily and without legal process upon the determination of the term, he may do so (*b*), subject however now, in the case where the term determines by some act of forfeiture, to the provisions of the Conveyancing Act (*c*), which expressly prevents the right from being enforceable by action *or otherwise* until its provisions have been complied with (*d*). And if he find the premises unoccupied he may use force to break them open for this purpose, even though the presence of articles of furniture would seem to point to an intention on the part of the tenant to return (*e*). It has even been held that if, after a notice to quit has been given by the landlord, the premises are deserted by the tenant without any intention to return to them, the landlord may break them open in order to resume possession before the notice has expired, and consequently before the tenancy is determined (*f*).

In any other case if he use force, whether in the entry itself or at any time before he has obtained actual and complete possession (*g*), he will render himself liable to be proceeded against criminally under 5 Ric. 2, stat. 1, c. 8 (which provides under pain of imprisonment that entry into lands and tenements shall be made "not with strong hand nor with multitude of people, but only in peaceable and easy manner"); but as that statute provides no civil remedy, he will not be liable to an action for damages by the tenant in

(*y*) *Timmins v. Rowlinson*, *supra*. Cf. *ante*, p. 617.

(*z*) *Johnstone v. Hudleston*, 4 B. & C. 922.

(*a*) *Farrance v. Elkington*, 2 Camp. 591; cited *ante*, p. 618.

(*b*) *Taunton v. Costar*, 7 T. R. 431.

(*c*) 44 & 45 Vict. c. 41, s. 14.

(*d*) *In re Riggs*, [1901] 2 K. B. 16.

See this matter discussed *ante*, pp. 657 *et seq.*

(*e*) *Turner v. Meymott*, 1 Bing. 158. Cp. *Williams v. Taperell*, 8 T. L. R. 241, cited *ante*, p. 20.

(*f*) *Lacey v. Lear*, Penke, Add. Ca. 210. As to recovery of deserted premises, see *post*, p. 821.

(*g*) *Edwick v. Hawkes*, 18 Ch. D. at p. 211, per Fry, J. (reported as *Edridge v. Hawker*, 50 L. J. Ch. 577).

respect of the eviction (*h*). For independent wrongful acts, however, *e.g.*, an assault (*i*), or an injury to furniture (*k*), committed during such entry, he has been held (*l*) to be liable to an action. Where a tenant wrongfully refused to give up possession on the expiration of his term, it was held that removal of the roof with a view to rebuilding the premises did not amount to a forcible entry—on the ground that it did not belong to the class of acts at which the statutes of forcible entry are aimed,—so as to prevent the landlord from justifying an injury to the tenant's furniture which happened in consequence (*m*).

In the case of an assault, too, it is believed (though the authorities are greatly in conflict) that no such liability will attach where not more force has been used than is necessary to overcome the tenant's resistance. For although it has been held that such an act can only be justified by a lawful possession, and that the landlord's possession is rendered unlawful by the statute (*n*), it has since been laid down in the House of Lords that as soon as a person entitled enters in the assertion of possession, the law immediately vests the actual possession in him, and so far as relates to the fact of possession and its legal consequences it makes no difference whether it has been taken forcibly or not (*o*). The correct view seems to be that the possession of a rightful owner gained by forcible entry is lawful *as between the parties*, though he may be liable to punishment for the breach of the peace (*p*). And if this be so, it seems difficult to understand how the "independent wrongful acts," *i.e.*, acts which can be justified only if the person who has entered forcibly was in lawful possession (*q*), above spoken of, when not "exceeding the occasion," but arising naturally and inevitably out of the eviction, can be relied upon by the tenant as giving him a right of action. Moreover, once the landlord has obtained possession he is entitled to use force if the tenant wrongfully endeavour to re-enter (*r*); and in such case the tenant will

(*h*) *Beddall v. Maitland*, 17 Ch. D. 174, per Fry, J.; *Pollen v. Brewer*, 7 C. B. N. S. 371. As to power to order restitution of possession to the tenant, see 21 Jac. 1, c. 15.

(*i*) *Pollen v. Brewer*, *supra*; *Edwicks v. Hawkes*, 18 Ch. D. 199 (reported as *Edridge v. Hawker*, 50 L. J. Ch. 577).

(*k*) *Beddall v. Maitland*, *supra*; *Hilary v. Gay*, 6 C. & P. 284.

(*l*) See, however, next paragraph.

(*m*) *Jones v. Foley*, [1891] 1 Q. B. 730.

(*n*) *Newton v. Harland*, 1 M. & Gr. 644—a decision, however, treated as overruled in *Blades v. Higgs*, 10 C. B.

N. S. 713, and stated in a work of authority (1 Sm. L. C. at p. 139, 11th ed., notes to *The Six Carpenters' case*) to be contrary to "the almost universal opinion of the profession."

(*o*) Per Lord Selborne, in *Lowe v. Telford*, 1 App. Ca. 414, citing *Jones v. Chapman*, 2 Exch. 803, and *Harvey v. Brydges*, 14 M. & W. 487.

(*p*) Pollock on Torts, p. 378 (7th ed.).

(*q*) Per Fry, J., *Beddall v. Maitland*, 17 Ch. D. at p. 190.

(*r*) *Scott v. Matthew Brown & Co.*, 51 L. T. 746.

(if he himself use force) bring himself within the provisions of the above enactment (*s*).

It may be added that a licence given by a tenant to his landlord to eject him on a specified date without any legal process has been held to be void, as in effect a licence to commit a crime within the statute in question (*t*); but a proviso of re-entry (upon a breach of covenant being committed) to the same effect in the contract of letting has been upheld as valid (*u*), though this is now within the Conveyancing Act (*x*). Where a landlord who had distrained for rent was induced to withdraw by receiving an undertaking from the tenant to give up possession within a week, and the tenant acted thereon by selling some of the furniture in the meantime, it was held that the landlord who re-entered at the end of the week was not liable to an action of trespass (*y*).

The danger of a breach of the peace resulting from an attempt by the landlord summarily to take possession of premises held over by the tenant renders it as a rule desirable to resort to an action of ejectment.

DIV. IV.—EJECTMENT.

SECT. 1.—PROCEEDINGS IN THE HIGH COURT.

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Formerly land could only be recovered by a special procedure. Before the C. L. P. Act, 1852 (15 & 16 Vict. c. 76), it was

(*s*) See *Lowe v. Telford*, *supra*.

(*t*) *Edwick v. Hawkes*, 18 Ch. D. 199 (reported as *Edridge v. Hawker*, 50 L. J. Ch. 577).

(*u*) *Kavanagh v. Gudge*, 7 M. & Gr.

316. The above point was apparently not taken.

(*x*) 44 & 45 Vict. c. 41, s. 14. Cf. p. 763, *supra*.

(*y*) *Feltham v. Cartwright*, 5 Bing. N. C. 569.

commenced by a declaration of ejectment by one fictitious person against another. The plaintiff alleged that he had entered on the property in dispute in right of a lease from the real claimant, and had been ejected by the defendant (hence called the "casual ejector"), who thereupon gave notice to those in possession that he would not defend the action; and, as a condition of defending, a consent rule had to be entered into confessing the fictitious lease, entry, and ouster (*z*). This process was abolished in the year 1852 in favour of a writ in ejectment, and a new procedure, without pleadings, was elaborated in a long series of rules. These in turn have been repealed, with certain exceptions (*a*), which, however, so far as they deal with matters strictly of procedure (*b*), are now practically obsolete.

The action, which under the existing rules is called one "for the recovery of land," is commenced by an ordinary writ. The pleadings and procedure are for the most part the same as in other actions, and it is only proposed to notice here (more than incidentally) those provisions of practice which are peculiar to the action in question.

Ejectment may be brought by the Crown or its lessee (*c*), but *against* the Crown the proper remedy is by petition of right (*d*).

Before issuing the writ a landlord should consider specially: (1) where his claim is for re-entry or forfeiture under a lease, whether the Conveyancing Act, 1881, s. 14, applies to it (*e*); (2) where the tenancy is at will, whether it has been legally determined (*f*).

It must also be remembered that the issue of this writ is (after service) a conclusive election to determine a tenancy (*g*).

Parties.—The proper plaintiffs are the persons in whom is the right of immediate entry; if tenants in common, they may be joined as co-plaintiffs (*h*). A mortgagor otherwise entitled may sue so long as the mortgagee has not given him notice of his intention to take possession or enter into receipt of the rents and profits (*i*). A person suing on an equitable title—and this will perhaps include, in the case of leases made after the year 1881, any

(*z*) Cole, Ejec. 1.

(*a*) Sects. 209, 211, 212, 214, 218, 219, 220. Sects. 210, 213, and 217 are repealed only in part: see 55 & 56 Vict. c. 19.

(*b*) As to those not merely of procedure, see pp. 671 *et seq.*, *ante*.

(*c*) *Doe v. Roberts*, 13 M. & W. 520.

(*d*) *Doe v. Roe*, 8 M. & W. 579.

(*e*) *Ante*, p. 657. It has already been stated (*ante*, p. 322) that actual re-entry is no longer necessary.

(*f*) *Ante*, p. 596.

(*g*) *Ante*, p. 656.

(*h*) See *ante*, p. 38; *Elliss v. Elliss*, E. B. & E. 81 (under the C. L. P. Act).

(*i*) Jud. Act, 1873, s. 25, sub-s. (5). See *Matthews v. Usher*, [1900] 2 Q. B. 535, cited *ante*, p. 322.

person entitled, subject to the term, to the income of the whole or any part of the land leased (*j*)—must make the person in whom the legal estate is vested a party to the action (*k*). Parties who sue (or are sued) in a representative capacity (*l*) should be so described in the indorsement of the writ. On the death of a landlord entitled to leaseholds, the proper persons to sue in ejectment are his executors or administrators, inasmuch as the term, as already seen (*m*), vests in them (*n*); and the same thing now applies in the case of demised freeholds where the death of the owner takes place after the year 1897 (*o*).

The proper defendants are the persons in possession as tenants or sub-tenants, or their executors or administrators. Possession of land shown to be included in a lease, being referable to a rightful rather than a wrongful title, is *prima facie* evidence of the term granted by the lease being vested in the persons in possession by assignment (*p*). If a tenant occupy by a sub-tenant, it is at the landlord's option to sue either or both, it being no longer, as formerly (*q*), imperative (though in ordinary cases still the proper practice (*r*)) to direct the writ to the persons in actual possession. Where, however, there are a number of sub-tenants in possession, and it is desired to save the expense of making them all defendants in the first instance, it is apprehended that inclusion in the writ of the lessee alone will be sufficient, if notice thereof be given to the sub-tenants, so as to afford them an opportunity of appearing if they so desire, in conformity with the practice hereinafter referred to (*s*). Regard, too, must be had in applying the rule to all the circumstances of the case; and if those circumstances show that the real object of the action is not to recover possession, but to secure some collateral purpose such as the execution of repairs to the premises, and that object can be attained by issuing the writ against the lessee or his assignee alone, the costs of making the sub-tenants parties to the action will be disallowed (*t*). If the

(*j*) Conv. Act, 1881 (44 & 45 Vict. c. 41), s. 10; *ante*, pp. 439, 440.

(*k*) *Allen v. Woods*, 68 L. T. 143.

(*l*) R. S. C. 1883, O. 3, r. 4.

(*m*) *Ante*, p. 441.

(*n*) *Cole*, Ejec. 533.

(*o*) 60 & 61 Vict. c. 65, s. 1. But on an intestacy, and before the grant of letters of administration, the proper plaintiff would seem to be the heir-at-law: *John v. John*, [1898] 2 Ch. 573, per North, J., cited *ante*, p. 57.

(*p*) *Magdalen Hospital v. Knotts*, 8 Ch. Div. 709; *affd.*, 4 App. Ca. 324.

(*q*) C. L. P. Act, 1852, s. 163.

(*r*) *Minet v. Johnson*, 63 L. T. 507. See per Lindley, L. J.

(*s*) See *infra*, p. 774. It will be observed that in the last-cited case no such notice had been given.

(*t*) *Geen v. Herring*, [1905] 1 K. B. 152. In this case four different actions against numerous sub-tenants had been brought in respect of four leases, when (the leases being all vested in one person) one action against him would have been sufficient; and the Court declined to disallow all the costs of the

occupier is the tenant's servant, the tenant alone should be sued: a servant, however, may by resisting an attempted entry by the landlord render himself liable to be treated as a tenant (*u*).

Indorsement of the writ.—The writ may at the plaintiff's option be specially indorsed "in actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent (*x*), or against persons claiming under such tenant" (*y*).

An action is not "for the recovery of land" unless possession is asked for (*z*). It is not "by a landlord against a tenant" unless the plaintiff was himself a party to the contract of tenancy, or the defendant is by attornment or otherwise estopped (*a*) from disputing his title (*b*); but the relationship may be sufficiently created by an attornment clause in a mortgage deed (*c*).

The rule applies to a tenancy at will when duly determined (*d*), but not (except, as above stated, in the case of non-payment of rent) to actions founded upon a forfeiture (*e*), or upon a notice to quit itself founded on a forfeiture (*f*); though it applies to a tenancy by attornment between mortgagor and mortgagee which, though expressed to be from year to year at a yearly rent payable half-yearly, is in terms made determinable by the mortgagee at any time without previous notice (*g*). Where, however, a writ claiming arrears of rent in addition to possession failed on the ground just stated, though purporting to be specially indorsed, to fall within the rule, it was held that the Court had power (*h*) to deal with the claim for rent by ordering summary judgment for it to be entered (*i*). The indorsement to be "special" must be

others by reason only of the existence of a consent order to which that person (who had appeared as landlord) had been party.

(*u*) *Doe v. Roe*, 2 Chit. 179.

(*x*) R. S. C. Jan. 1902, r. 1.

(*y*) O. 3, r. 6 (F.).

(*z*) *Gledhill v. Hunter*, 14 Ch. D. 492 (disapproving *Whetstone v. Dewis*, 1 Ch. D. 99).

(*a*) As to this, see p. 466, *ante*.

(*b*) *Casey v. Hellyer*, 17 Q. B. Div. 97.

(*c*) *Daubus v. Lavington*, 13 Q. B. D. 347 (apparently overruling *Hobson v. Monk*, W. N. 1884, p. 17); *Mumford v. Collier*, 25 Q. B. D. 279. See p. 463, *ante*.

(*d*) *Daubus v. Lavington*, *supra*; *Hall v. Comfort*, 18 Q. B. D. 11.

(*e*) *Mansegh v. Rimell*, W. N. 1884, p. 34. Nor (probably) upon a surrender: see at note (*u*), *post*, p. 797.

(*f*) *Arden v. Boyce*, [1894] 1 Q. B. 796. The rule, it is conceived, may still be so expressed in general terms, though the circumstances of the case itself would now bring it within the exception.

(*g*) *Kemp v. Lester*, [1896] 2 Q. B. 162. Such a tenancy (see *ante*, p. 2) is not, as described in the head-note of the case, a tenancy at will.

(*h*) See R. S. C. 1883, O. 14, r. 1 (*b*).

(*i*) *Arden v. Boyce*, *supra*.

confined to the claims mentioned in the rule, and be to the effect of the prescribed form (*k*); but so long as the writ itself is good, it will not be vitiated by the inclusion of a claim, not mentioned in the rule, in the affidavit in support of an application for summary judgment (*l*). Where a writ as served upon the defendants specified the date at which the lease was made and the mode of its devolution upon them from the original lessee, it was held that the indorsement did not cease to be special within the rule by reason of the fact that it did not mention the length of the term for which the lease was granted (*m*). If a special indorsement is impracticable or not desired, the writ must be indorsed generally (*n*).

As in other actions, the writ may contain a statement to the effect that, if the defendant appears, the plaintiff intends to proceed to trial without pleadings (*o*).

Joinder of causes of action.—"No cause of action shall, unless by leave of the Court or a judge, be joined with an action for the recovery of land, except claims in respect of mesne profits (*p*) or arrears of rent or double value (*q*) in respect of the premises claimed or any part thereof, and damages for breach of any contract (*r*) under which the same or any part thereof are held, or for any wrong or injury to the premises claimed" (*s*).

Where leave is required, it should be applied for *ex parte* at chambers before the issue of the writ (*t*). It may, however, be granted subsequently (*u*) as a matter of discretion upon an application at chambers for leave to amend: this should be made *ex parte* if before service of the writ (*x*), and by summons if after service (*y*), in which case very special grounds must be shown for the indulgence (*z*). Delay, and inconsistency with relief already claimed, are both grounds for refusing it (*a*). It seems that the irregularity of joining without leave another claim to

(*k*) App. C., Sect. VII., No. 1.

(*l*) *Southport Tramways Co. v. Gandy*, [1897] 2 Q. B. 66.

(*m*) *Hanmer v. Clifton*, [1894] 1 Q. B. 238.

(*n*) R. S. C. 1883, O. 2, r. 1; O. 3, rr. 2, 3: App. A., Pt. III., s. 4.

(*o*) R. S. C. 1893, O. 18A, where the preliminary steps to a trial so held are set out. The Order, as already stated (*ante*, p. 162), is seldom resorted to.

(*p*) See pp. 771, 772, *infra*.

(*q*) As to this, see *ante*, pp. 757 *et seq.*

F.

(*r*) *E.g.*, to repair: *Rowe v. Kelly*, 59 L. T. 139.

(*s*) R. S. C. 1883, O. 18, r. 2.

(*t*) *In re Pilcher*, 11 Ch. Div. 905.

(*u*) See *Lloyd v. Great Western, &c., Dairies*, 23 T. L. R. 570.

(*x*) *Hunt v. Fensham*, cited in Ann. Pr., note to O. 18, r. 2.

(*y*) *Rusbrooke v. Farley*, 54 L. J. Ch. 1079.

(*z*) *Musgrave v. Stevens*, W. N. 1881, p. 163.

(*a*) *Clark v. Wray*, 31 Ch. D. 68.

one for the recovery of land can only be cured by amendment of the writ, and not by the omission of the claim for the recovery of land from the statement of claim (*b*). If amendment be refused, the whole action will on application be stayed (*c*).

A defendant wishing to object to a misjoinder under this rule may apply—promptly and before taking any other step—to set aside the writ or pleading in which it first occurs; and by appearing to the writ (*d*), or by merely pleading the objection and going to trial (*e*)—nor will such pleading be struck out as embarrassing (*f*),—he has been held to have waived the irregularity (*g*). And notwithstanding a decision to the contrary (*h*), it is now settled that the joinder without leave of other claims with one for the recovery of land is an irregularity capable of being waived by the defendant (*i*).

“Cause of action,” in this rule, means a claim for relief not founded upon or ancillary to that for possession. Thus, no leave is required to add a claim for a declaration of title or a receiver (*k*), or for an injunction against interference with the plaintiff’s quiet enjoyment (*l*). So where the writ claimed, in addition to possession, a declaration that an alleged mortgage being fictitious and invalid created no charge on the land comprised in it, it was held that an alternative claim might be joined for an account of what was due on the mortgage and for redemption, because in substance this amounted to a mere claim for possession on payment of what might be found to be due should the mortgage turn out to be valid (*m*). But it is otherwise if the injunction claimed is to restrain from breaches of covenant, either (perhaps) perpetually (*n*), or until the time of the trial (*o*), unless (in the latter case) damages for breach of covenant are also claimed under the rule; for inasmuch as those damages may be assessed (*p*) down to the actual

(*b*) *Wilmott v. Freehold House Property Co.*, 51 L. T. 552.

(*c*) *Brandreth v. Shears*, W. N. 1883, p. 89.

(*d*) *Mulckern v. Doerks*, 53 L. J. Q. B. 526.

(*e*) *Re Derbon*, 58 L. T. 519.

(*f*) *Wilmott v. Freehold House Property Co.*, *supra*.

(*g*) See O. 70, r. 2.

(*h*) *Hunt v. Worsfold*, [1896] 2 Ch. 224.

(*i*) *Lloyd v. Great Western, &c., Dairies*, *supra*. In this case leave had been given to amend the writ by adding a

plaintiff, and it was held by Buckley, L. J., that (apart from waiver) this was equivalent to giving the necessary leave for joinder, as being in substance an approval of the writ as it then was.

(*k*) *Gledhill v. Hunter*, 14 Ch. D. 492; *Allen v. Kennet*, 24 W. R. 845.

(*l*) *Kendrick v. Roberts*, 46 L. T. 59.

(*m*) *Hunt v. Worsfold*, *supra*.

(*n*) *Read v. Wotton*, *infra*, per Stirling, J.

(*o*) *Hambling v. Walland*, W. N. 1889, p. 133.

(*p*) Under O. 33, r. 58.

time of assessment, such an injunction is then merely a substitute for that portion of them which would otherwise accrue between the issue of the writ and the trial of the action (*q*). The rule extends to a counterclaim (*r*).

Among the causes of action which a plaintiff has obtained leave to join with an action for the recovery of land are a claim for the recovery of a deed relating to the land in dispute and of personal estate comprised in the same instrument (*s*), a claim for the administration of an estate of which the land forms part (*t*), a claim for damages for forcible entry upon the land (*u*), and an alternative claim for payment of a valuation of certain tenants' interests (*x*).

The right is expressly reserved to a landlord by the C. L. P. Act, 1852, either to claim mesne profits at the trial of an action of ejectment, or to sue for them subsequently (*y*); in which case a judgment in his favour, although by default, in the first action would be conclusive evidence in the second of his title at the date of the first writ (*z*). A doctrine, however, already adverted to (*a*) makes it questionable whether he should now sever such claims. He may, on proof of having given due notice of trial, recover mesne profits from the determination of the tenancy down to the day of trial (*b*), whether the tenant appears at the trial or not (*c*), and whether he has claimed them in the writ or not (*d*). And he may afterwards sue for mesne profits which may have accrued from such day of trial down to the time possession is delivered to him (*e*). On the hearing of an application for summary judgment in an action on a specially indorsed writ claiming possession and mesne profits, it has been held that the Court has jurisdiction to order mesne profits to be given, not merely down to the time of the order, but down to the time of the actual delivery of possession to the plaintiff (*e*).

It is to be observed that mesne profits are in contemplation of law damages for a trespass (*f*). Actual occupation by a defendant

(*q*) *Read v. Wotton*, [1893] 2 Ch. 171.

(*r*) *Compton v. Preston*, 21 Ch. D. 138.

(*s*) *Cook v. Enchmarch*, 2 Ch. D. 111.

(*t*) *Kitching v. Kitching*, 24 W. R. 901.

(*u*) *Dennis v. Crompton*, W. N. 1882, p. 121.

(*x*) *Rusbrooke v. Farley*, 54 L. J. Ch. 1079.

(*y*) Sects. 214, 218.

(*z*) *Harris v. Mulkern*, 1 Ex. D. 31.

(*a*) *Ante*, p. 761.

(*b*) See now R. S. C. 1883, O. 36, r. 58.

(*c*) 15 & 16 Vict. c. 76, s. 214.

(*d*) *Smith v. Tett*, 9 Exch. 307. Under the present practice, where the writ was silent as to mesne profits, an application would probably be made to amend under O. 28, r. 1.

(*e*) *Southport Tramways Co. v. Gandy*, [1897] 2 Q. B. 66.

(*f*) See *Dunlop v. Macedo*, 8 T. L. R. 43.

during the period for which they are claimed is therefore not essential; for he may have been a trespasser by another. Thus where, after a demand of possession by the claimants, the defendant encouraged his sub-tenant to remain in occupation and received rent from him, this was held to be evidence for a jury of his liability for mesne profits (*g*).

Service.—This should, if practicable, be effected upon every defendant named in the writ. Probably, however, it would suffice under the new, as it did under the old, practice, to serve one of several persons in possession as joint tenants, whether as executors (*h*) or otherwise (*i*).

In case of vacant possession, service, *when it cannot otherwise be effected*, may be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property (*k*). Possession is not vacant merely because the premises are unoccupied; for a tenant may without actual occupation be constructively in possession, as by leaving hay in a barn, or beer in a cellar (*l*). But if the tenant has locked up the house and left the neighbourhood (*m*), or if the house has been pulled down (*n*), or is unfinished or otherwise uninhabitable (*o*), the possession will be held vacant.

The Court has also a general power (*p*) to order service upon some person other than the defendant, or by advertisement, or in any other way, to be substituted for personal service (*q*); but if the defendant at the time it is issued (*r*) is out of the jurisdiction (and has not left merely in order to evade service (*s*)), the writ itself must have been issued by leave (*t*).

And where the whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits) (*u*), or "whenever any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction is sought to be construed, rectified, set aside, or enforced in the action" (*x*), service out of the jurisdiction of the writ or notice

(*g*) *Doe v. Harlow*, 12 A. & E. 40.

(*h*) *Doe v. Roe*, 4 D. & L. 431.

(*i*) *Doe v. Roe*, 10 Moore, 493; *Doe v. Roe*, 7 C. B. 127.

(*k*) O. 9, r. 9; *Isaacs v. Diamond*, W. N. 1880, p. 75. See, as to the practice, note to Ann. Pr., and Forms, App. K., No. 71.

(*l*) *Savage v. Dent*, 2 Str. 1064.

(*m*) *Doe v. Cock*, 4 B. & C. 259.

(*n*) *Doe v. Roe*, 2 Dowl. 399, 428.

(*o*) *Doe v. Roe*, 3 Dowl. 691.

(*p*) O. 9, r. 2.

(*q*) *Eg., Crane v. Jullion*, 2 Ch. D. 220.

(*r*) See *Jay v. Budd*, [1898] 1 Q. B. 12.

(*s*) See *Wilding v. Bean*, [1891] 1 Q. B. 100.

(*t*) See *Fry v. Moore*, 23 Q. B. Div. 395.

(*u*) O. 11, r. 1 (a).

(*x*) O. 11, r. 1 (b). See decisions on this rule cited *ante*, pp. 161, 216, 718.

may be allowed by a judge (*y*) at chambers in a proper case, provided that the writ was issued by leave in the first instance (*z*). It would seem that an action for the recovery of land is clearly an action within the former of the above rules (*a*).

Notice of the writ by a tenant to his landlord.—It may be well here to call attention to the 209th section of the C. L. P. Act, 1852 (*b*), although it applies only to an ejectment brought adversely to the landlord, or inconsistent with his title (*c*), being designed to prevent collusive judgments for possession of his land behind his back. "Every tenant to whom any writ in ejectment shall be delivered, or to whose knowledge it shall come, shall forthwith (*d*) give notice thereof to his landlord, or his bailiff or receiver, under penalty of forfeiting the value of three years' improved or rack-rent of the premises demised or holden in the possession of such tenant to the person of whom he holds, to be recovered by action in any court of common law having jurisdiction for the amount."

It is presumed that the expression "any writ in ejectment" will be held to include the modern writ for recovery of land (*e*). The "improved or rack-rent" is not necessarily the rent reserved, but such a rent as the parties might fairly agree on at the date of the writ in case the premises were then let (*f*).

Appearance.—A defendant named in the writ should enter an appearance within the time limited by it (ordinarily eight days) from the service, or completion of the substituted service (*g*). He may appear at any time before judgment, but, except by leave, has no further time for pleading or any other purpose than if he had appeared within the time limited by the writ (*h*). If, however, there should be grounds for applying to set aside the service or to discharge the order (if any) authorizing it, such application should be made at once, and before taking any further step, and the grounds of objection should be specified in the summons or notice

(*y*) Not by a master: O. 54, r. 12.

(*z*) O. 2, r. 4. See *Fry v. Moore*, *supra*.

(*a*) See *Agnew v. Usher*, 14 Q. B. D. 78, per Lord Coleridge, C. J. In *Tassell v. Hallen*, [1892] 1 Q. B. 321, cited *ante*, p. 216, it will be noticed that damages were claimed for non-repair, so that land was not the whole subject-matter of the action.

(*b*) Re-enacting 11 Geo. 2, c. 19, s. 12.

(*c*) *Buckley v. Buckley*, 1 T. R. 647, where it was brought by the landlord's mortgagee.

(*d*) Cf. *ante*, p. 226.

(*e*) See the observation at p. 807, *post*.

(*f*) *Crooker v. Fothergill*, 2 B. & A. 652.

(*g*) *Crane v. Jullion*, 2 Ch. D. 220.

(*h*) O. 12, r. 22.

of motion (*i*); but a mere nullity (*e.g.*, service without showing the original writ) is not within this rule (*k*).

A servant or bailiff, if served with a writ for recovery of land only, should not appear, but send the writ to his employer and suffer judgment by default, for if he appear and defend, this will be evidence against himself of possession (*l*), and the practice is not to give costs against him in the former case (*m*); while, if a subsequent action for mesne profits (*n*) should be brought, such a judgment would only be *primâ facie* evidence of his possession at the date of the first writ (*o*). Any person may limit his appearance, either in his memorandum of appearance or by notice in writing within four days, to a part of the property claimed (*p*).

Any person *not named in the writ* may, by leave, appear and defend, on showing by affidavit that he is "in possession either by himself or by his tenant" of the premises in question (*q*). Leave should be applied for at chambers *ex parte* (*r*). It will be granted, as a matter of course, to an applicant in time whose affidavits are satisfactory; and a resident out of the jurisdiction will not be required to give security for costs (*s*). If, however, an extension of time for pleading is required, notice of the application should probably be given to all the parties to the record. A person appearing in right of possession by his tenant only must state in his appearance that he appears "as landlord" (*t*). All persons appearing by leave must forthwith give notice of their appearance to the plaintiff's solicitor (*u*). In subsequent proceedings, persons appearing under this rule are to be named as parties defendant to the action (*u*).

The plaintiff may apply by motion or summons to set aside such appearance. The burden of proof is upon the applicant for leave (*x*), but if his affidavits show a strong *primâ facie* case of possession he may be admitted to defend without deciding questions of difficulty involved. Thus, where a lessor brought ejectment against the lessee of a theatre upon a forfeiture, the Court

(*i*) O. 70, rr. 2 and 3. See *Fry v. Moore*, 23 Q. B. Div. 395.

(*k*) See *Phillipson v. Emanuel*, 56 L. T. 858.

(*l*) *Doe v. Stanton*, 2 B. & A. 371; *Doe v. Stradling*, 2 Stark. 187.

(*m*) *Cole*, Ejec. 124.

(*n*) *Supra*, pp. 771, 772.

(*o*) *Pearse v. Coaker*, L. R. 4 Ex. 92.

(*p*) O. 12, rr. 28, 29; App. A., Pt. II., Nos. 3 and 4.

(*q*) O. 12, r. 25, reproducing C. L. P. Act, 1852, s. 172.

(*r*) See note to O. 12, r. 25, in Ann. Pr.

(*s*) *Butler v. Meredith*, 11 Exch. 85.

(*t*) O. 12, r. 26.

(*u*) O. 12, r. 27.

(*x*) *Whitworth v. Humphries*, 5 H. & N. 185.

allowed an applicant, who deposed that he was in possession of some private boxes of which he claimed to be sub-lessee, to defend as to them, without deciding whether he took more than an easement under the instrument produced (*y*).

Neither an *elect* creditor of a lessee (*z*), nor one who has signed judgment against him for the recovery of the land in question (*a*), has (it has been held) the possession required by this rule until the land is actually delivered in execution (*b*). But an equitable tenant for life in possession has under this rule been granted leave to defend an action of ejectment brought against the trustees (*c*). Persons in actual possession of the premises claimed, if not named as defendants, must, now that they are no longer necessary parties, apply under the rule if they wish to appear (*d*).

In actions as between landlord and tenant the plaintiff is *ex hypothesi* either the lessor or his successor in title, so that questions as to what is sufficient "possession by his tenant" by a third party are almost excluded. The provision in force before the year 1852 (*e*), by which the Courts might permit the "landlord" to make himself defendant, was held to apply even to a landlord *de jure*, e.g., an heir (*f*), or a devisee in trust (*g*) (though neither had been in possession or receipt of rent), so long as there was privity between such party and the person under whom the tenant claimed (*h*). It was also held to extend to a mortgagee of the tenant's term out of possession (*i*), provided he had a *bonâ fide* interest in the action (*k*); but it would seem to be without authority and contrary to principle to construe the modern rule of practice (first introduced by the C. L. P. Act, 1852 (*l*)) with such liberality (*m*).

An attornment, however, to such a mortgagee would, it is submitted, create a tenancy for the purposes of this rule as well as of that relating to special indorsement (*n*). In its absence he might possibly obtain an order to be joined as defendant (*o*) (though this

(*y*) *Croft v. Lumley*, 4 E. & B. 608.
Cp. *Leader v. Hayes*, 54 L. T. 204.

(*z*) *Croft v. Lumley*, *supra*.

(*a*) *Thompson v. Tomkinson*, 11 Exch. 442.

(*b*) It is thought that this would still apply under the present practice of registration of the writ (see *ante*, p. 450).

(*c*) *Longbourne v. Fisher*, 47 L. J. Ch. 379.

(*d*) *Minet v. Johnson*, 63 L. T. 507, cited *supra*, p. 767.

(*e*) 11 Geo. 2, c. 19, s. 13.

(*f*) *Doe v. Roe*, 3 T. R. 783, n.

(*g*) *Lovelock v. Dancaaster*, 4 T. R. 122.

(*h*) *Doe v. Birchmore*, 9 A. & E. 662, per Coleridge, J.

(*i*) *Doe v. Cooper*, 8 T. R. 645.

(*k*) *Doe v. Roe*, 6 Bing. 613.

(*l*) Sect. 172.

(*m*) See *Whitworth v. Humphries*, 5 H. & N. 185.

(*n*) *Supra*, p. 768.

(*o*) Under O. 16, r. 11.

was refused under the corresponding rule of 1875 (*p*), his right to have a judgment by default against the tenant set aside having now been recognised (*q*). So a mortgagor has under special circumstances been allowed to defend as landlord an action of ejectment brought by the mortgagee against a tenant under a lease made by the mortgagee after the mortgage (*r*). The old rule that no person should have leave to appear if he claimed in opposition to the title, either of the tenant (*s*) or of the plaintiff (where the tenant had received possession from him) (*t*), will doubtless still prevail. More than one person may be admitted under this rule to defend, *e.g.*, one person for part of the premises claimed in the ejectment and another for another part (*u*), or one person for the whole and another for part as assignee of an underlease (*x*).

A person who comes in to defend as landlord is in the same position as the tenant as regards the defences he is entitled to raise (*y*). His appearance operates as an acknowledgment that he is landlord of the premises for which the ejectment is brought, so that to connect him with them it is sufficient if the writ is shown to have been served on the tenant in possession (*z*).

Consequences of appearing.—Under the former practice every defendant who appeared was liable to a successful plaintiff for the whole of his costs, even where he only defended as to part of the property in dispute, unless he confessed the plaintiff's title to that part before trial (*a*). It is doubtful whether this rule would now be enforced (*b*).

Upon what terms, as to payment of costs occasioned by other defendants defending separately, one of several defendants ought to be allowed to withdraw his defence before trial is a matter of judicial discretion, to be exercised with due regard to all the circumstances of each case (*c*).

Consequences of not appearing.—If no appearance, or only a limited appearance, is entered within the time prescribed, the

(*p*) *Mills v. Griffiths*, 45 L. J. Q. B. 771.

(*q*) *Jacques v. Harrison*, 12 Q. B. Div. 166, cited *infra*, p. 779.

(*r*) *Crowle v. Russell*, 4 C. P. Div. 186. Bramwell, L. J., seems, however, to have doubted the validity of the order.

(*s*) *Fairclain v. Shamittle*, 3 Burr. at p. 1295.

(*t*) *Doe v. Rhys*, 2 Y. & J. 88.

(*u*) *Doe v. Roe*, 15 M. & W. 431.

(*z*) This seems to have been allowed in *Chester v. Wortley*, 17 C. B. 410.

(*y*) See p. 781, *infra*.

(*a*) *Doe v. Alexander*, 3 Camp. 516.

(*a*) *Johnson v. Mills*, L. R. 3 C. P. 22.

(*b*) See *Stumm v. Dixon*, 22 Q. B. Div. 529.

(*c*) *Real and Personal Advances Co. v. McCarthy*, 18 Ch. Div. 362. See per Lush, L. J.

plaintiff may, if the date of service has been duly indorsed on the writ (*d*), and if an affidavit of service (or of notice in lieu of service) has been duly filed (*e*), enter final judgment for possession of the whole of the premises, or of the part to which the appearance does not apply (*f*). No costs will be allowed on signing judgment in default of appearance (*g*). Where the service, however, has been as upon a vacant possession (*h*), it is the practice to require a master's order before entering judgment (*i*). Final judgment may be signed, not only for the land, but also, as it seems, for any mesne profits, arrears of rent, or double value, if claimed as a liquidated sum by the writ (*k*), together with interest and (in this case) costs also (*l*); and interlocutory judgment may be entered for any damages claimed for breach of contract, or wrong or injury to the premises in dispute, which will thereupon be assessed either by issuing a writ of inquiry or as otherwise directed (*m*). For any claims other than those above specified the action must proceed as if appearance had been entered (*n*).

Where under the former practice (*o*) an action of ejectment in which judgment had been obtained by default was followed by an action for mesne profits, the plaintiff could in that action recover the costs of the ejectment (*p*): and it seems probable that this might apply to the inquiry necessary, as has just been seen, where mesne profits are not claimed as a liquidated sum.

If one of two or more defendants appears and the other or others make default, the plaintiff may sign interlocutory judgment for the land against the defendant in default, the effect of which is to bar his appearance; but he cannot issue execution until he gets final judgment (*q*). And this will not be granted so long as any defendant—whether named in the writ or appearing by leave—is in the field: for it entitles a plaintiff to possession against the world (*r*). If one of several defendants cannot be served, even by

(*d*) O. 9, r. 15.

(*e*) O. 13, r. 2.

(*f*) O. 13, r. 8; App. F., No. 3.

(*g*) See note to O. 13, r. 8, in Ann. Pr.

(*h*) O. 9, r. 9; *supra*, p. 772.

(*i*) See note to O. 9, r. 9, in Ann. Pr.

(*k*) O. 13, r. 3, and r. 9 (as amended by R. S. C. 1885, r. 4). For all these claims may, it is submitted, be indorsed as a "liquidated demand" on the writ.

(*l*) If the annual value of the premises does not exceed 100*l.*, so that the action "could have been commenced" in a County Court (*post*, p. 794), the question of costs will be regulated by s. 116 of

the County Courts Act (51 & 52 Vict. c. 43), under which the recovery is *prima facie* necessary of a sum of at least 20*l.* for rent or 10*l.* for mesne profits. See note to O. 13, r. 8, in Ann. Pr.

(*m*) O. 13, rr. 5 (as amended by R. S. C. July, 1902, r. 1), 9 (as amended by R. S. C. 1885, r. 4); App. F., No. 2.

(*n*) O. 13, r. 12 (as amended by R. S. C. May, 1906, r. 1).

(*o*) *Supra*, p. 771.

(*p*) *Pearse v. Coaker*, L. B. 4 Ex. 92.

(*q*) See note in Ann. Pr. to O. 13, r. 8.

(*r*) See *infra*, p. 792.

recourse to the practice on vacant possession (*s*), his name would have to be struck out by order to amend before final judgment could be entered (*t*).

Setting aside judgment in default of appearance.—A judgment in default of appearance may be set aside or varied upon application at chambers on such terms as may be just (*u*). Two conditions are as a rule essential in setting aside all judgments by default—promptitude in applying after notice of the judgment (*v*), and an affidavit disclosing merits in the defence (*x*). The application may be made not only by a defendant who can satisfactorily account by special circumstances for his default, as where it has occurred through the inadvertence of his solicitor (*y*), but also by a person interested but not a party.

The Courts constantly exercised a discretion on the application of a person entitled to leave to defend as landlord under the enactment now repealed (*z*), to set aside a judgment and to give him leave to defend (*a*), where he had received no notice of the declaration of ejectment (*b*).

At one time it was thought that there was no authority to do this once the writ of possession had been executed (*c*), unless the neglect of the party to appear was caused by a mere accident (*d*), or unless the neglect of the tenant to give notice had been collusive (*e*); but these restrictions were not always observed (*f*). Where part of the premises had actually been sold and the purchaser had been put into possession, the landlord or other person entitled to defend was left to bring ejectment (*g*). Under the existing rule, persons in actual possession without notice of the proceedings may, even after execution, be let in to defend, so much only of the judgment as affects them being set aside (*h*). In the above cases the applicant, if successful, will at the same time get leave to appear (*i*).

(*s*) *Supra*, p. 772.

(*t*) See note in *Ann. Pr.* to O. 13, r. 8.

(*u*) O. 13, r. 10. Cf. O. 27, r. 15, *infra*, p. 782, which, however, gives no power to vary.

(*v*) *Isaacs v. Diamond*, W. N. 1880, p. 75.

(*x*) *Farden v. Richter*, 23 Q. B. D. 124. The Statute of Limitations affords a defence "disclosing merits" within this rule: *Maddocks v. Holmes*, 1 B. & P. 228.

(*y*) *Doe v. Roe*, 11 A. & E. 333.

(*z*) 11 Geo. 2, c. 19, s. 13; *supra*, p. 775.

(*a*) *Doe v. Roe*, 4 Burr. 1997.

(*b*) *Doe v. Roe*, 2 Har. & W. 130; see sect. 12 of the statute, *supra*, p. 773.

(*c*) *Doe v. Roe*, 3 Taunt. 506.

(*d*) *Doe v. Roe*, 13 Price, 260.

(*e*) *Doe v. Roe*, 5 Taunt. 205; *Doe v. Roe*, 4 Dowl. 115; *Doe v. Roe*, 2 C. & J. 682.

(*f*) *E.g.*, *Doe v. Shail*, 2 D. & L. 161; *Doe v. Roe*, 4 Burr. 1997; *Doe v. Roe*, 2 Har. & W. 130.

(*g*) *Goodtitle v. Badtitle*, 4 Taunt. 820.

(*h*) *Minet v. Johnson*, 63 L. T. 507.

(*i*) Under O. 12, r. 25, *supra*, p. 774.

A person who, although without the possession required by the rule just referred to, yet has or can acquire a *locus standi*, being the real sufferer by a judgment against the tenant, *e.g.*, an equitable mortgagee by deposit of the lease (*k*), has two courses open to him. If he can obtain the tenant's consent, he may apply in his name to have the judgment and writ of possession (if any) set aside; otherwise the application must be in his own name and be served on both plaintiff and defendant, and must ask further for liberty to defend in the tenant's name upon indemnifying him (*k*).

An order to set aside the judgment will, as a rule, be conditional upon the applicant paying the costs of the proceedings set aside (*l*). A plaintiff who has taken possession may, in the discretion of the Court, be ordered to withdraw (*m*).

Application for receiver.—Where the property which is the subject of the action has been sub-let by the tenant, a judge at chambers may, if it appear just and convenient, appoint a receiver of the rents and profits pending the action, and order the sub-tenants to attorn and pay rent to him (*n*); for the general principle is well established that in every case where an action of ejectment is pending, the Court has jurisdiction (*o*) to appoint a receiver (*p*). The probability of the plaintiff's ultimate success in establishing his claim, and the risk to the sub-tenants of having to pay their rent twice over, are the main considerations in making such an appointment (*q*).

Where possession was claimed of certain premises by the owners against a person occupying them as manager of a business on their behalf, but alleged by them to be only a tenant at will, it was held that the Court had jurisdiction, even on an interlocutory application, to appoint a receiver to whom possession was ordered to be given, though the defendant claimed under an agreement as a yearly tenant (*r*). So, where the demised premises consist of a public-house, the Court has power, upon such an application, to appoint a receiver of the licences (to whom they are to be handed

(*k*) *Jacques v. Harrison*, 12 Q. B. Div. 165.

(*l*) *Doe v. Roe*, 11 Price, 507.

(*m*) *Minet v. Johnson*, *supra*.

(*n*) *Gwatkin v. Bird*, 52 L. J. Q. B. 263, where form of order is given.

(*o*) Under Jud. Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. (8).

(*p*) *Foxwell v. Van Grutten*, [1897] 1 Ch. 64.

(*q*) *John v. John*, [1898] 2 Ch. 573.

(*r*) *Ind v. Mee*, W. N. 1895, p. 8.

over), and to order possession of the premises to be given to him, so far as may be necessary for the purpose of preserving the licences (*s*).

Application under Order 14.—In what cases a writ may be specially indorsed has been already considered (*t*). Where this has been done and the defendant has appeared, the plaintiff may apply notwithstanding for summary judgment. The practice is the same as in other actions: and where there are serious questions of fact in dispute—*e.g.*, under what circumstances the tenant was let into possession, and in what character rents have been received—the application cannot succeed (*u*).

Statement of claim.—The rules as to delivery of a statement of claim are the same as in other actions. If it is desired to claim any relief not asked for by the writ (*x*), regard must be had to the rules as to joinder of causes of action (*y*). If the plaintiff claims by devolution from the lessor, he should specify, first, what estate in reversion such lessor had, and, secondly, how he himself derives his title to it, stating in a summary form the effect of material deeds or documents: otherwise his pleading is liable to be struck out as embarrassing (*z*). And so long as the legal effect of such documents is stated, it is unnecessary (*a*) to set out their precise words, even though questions of construction may arise upon them (*b*). Or the defendant may if he please obtain the information in the form of particulars (*c*), or (subject to what is hereafter stated (*d*)) by means of interrogatories (*e*). If, on the other hand, the plaintiff rests his title upon an attornment by the tenant to himself (so that an estoppel will arise between them (*f*)), he should allege the time and manner thereof.

As in other actions, where in a statement of claim in ejectment details (*e.g.*, of alleged breaches of covenant) are given in the form

(*s*) *Charrington v. Camp*, [1902] 1 Ch. 386; *Whitbread v. Grain*, 23 T. L. R. 462.

(*t*) *Supra*, p. 768. See cases there cited.

(*u*) *Jones v. Stone*, [1894] A. C. 122.

(*x*) O. 20, r. 4.

(*y*) *Supra*, p. 769.

(*z*) *Philipps v. Philipps*, 4 Q. B. Div. 127. Cp. *Davis v. James*, 26 Ch. D. 778, cited *ante*, p. 437; O. 19, rr. 4, 27.

(*a*) O. 19, r. 21.

(*b*) *Darbyshire v. Leigh*, [1896] 1 Q. B. 554.

(*c*) *Palmer v. Palmer*, [1892] 1 Q. B. 319.

(*d*) *Infra*, p. 790.

(*e*) *Evelyn v. Evelyn*, 42 L. T. 248, per Malins, V.-C., who refused an application to strike out the pleading. Cp. *Pledge v. Pomfret*, 92 L. T. 560, where most of the above-cited cases will be found commented on in the judgment of Joyce, J.

(*f*) *Ante*, p. 471.

of particulars, no departure from them—subject to the right of amendment given by the present rules—will be permitted (*g*).

Defence (*h*).—To a claim for the recovery of land it is sufficient for a defendant to plead “that he is in possession by himself or his tenant,” unless his defence depends upon an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff,—a relief which it is open to him to claim in this way even as against the Crown (*i*). Such a plea puts in issue every allegation of fact in the statement of claim, and entitles the defendant to set up any ground of defence except those above specified (*k*). In pleading an equitable title the material facts and documents must be stated and referred to (*l*).

A defendant who appears by leave should specify this in his pleading. If he defends as landlord he may not set up any defence from which the tenant is estopped (*m*): he must stand or fall by the tenant's title (*n*). But though it appears to have been held that where a tenant suffered judgment by default a person defending as landlord could not rely upon the absence of notice to quit (*o*), the general rule is clear that a party who comes in to defend as landlord is always entitled to call upon the plaintiff to prove his case (*p*).

A defendant setting up an equitable right to a lease should counterclaim for specific performance (*q*). If the machinery of the King's Bench Division would be inadequate, *e.g.*, if the terms of the lease would have to be settled after judgment, this would be a ground for transferring the action to the Chancery Division (*r*).

Where mesne profits are claimed, the defendant, as in other actions, may pay money into court with a defence denying liability (*s*).

(*g*) See, *e.g.*, *Doe v. Broad*, 2 M. & Gr. 523.

(*h*) See form, App. D., sect. VII., No. 1.

(*i*) *Att.-Gen. for Trinidad v. Bourne*, [1895] A. C. 83.

(*k*) O. 21, r. 21. It follows that the second paragraph in the above “form,” alleging want of notice to quit, is quite unnecessary.

(*l*) *Sutcliffe v. James*, 40 L. T. 875.

(*m*) *Doe v. Smythe*, 4 M. & S. 347; *Doe v. Challis*, 17 Q. B. 166, per Coleridge, J. See *ante*, pp. 466 *et seq.*

(*n*) *Doe v. Litherland*, 4 A. & E. 784; *Doe v. Birchmore*, 9 A. & E. 662.

(*o*) *Doe v. Creed*, 5 Bing. 327.

(*p*) *Clarke v. Arden*, 16 C. B. 227. Cp. *Doe v. Horn*, 3 M. & W. 333.

(*q*) See *Wood v. Beard*, 2 Ex. D. 30; and cp. *Frith v. Frith*, [1906] A. C. 254. An amendment at the trial would now be granted in many cases: see *ante*, p. 14.

(*r*) *Hillman v. Mayhew*, 1 Ex. D. 132. Cp. *London Land Co. v. Harris*, 13 Q. B. D. 540.

(*s*) *Rowe v. Kelly*, 59 L. T. 139.

If the statement of defence discloses no answer, so far as the defendant is concerned, to the claim for possession, the plaintiff, as in other actions, may apply (*t*) for judgment upon admissions (*u*).

Default in delivering defence.—If no defence be delivered within the time allowed, the plaintiff may enter judgment that the person whose title is asserted in the writ shall recover possession of the land with his costs (*x*). If the defence is as to part only, he may by leave enter judgment for the other part, if severable; provided that if there is a counterclaim execution shall not issue without leave (*y*). No special provision is made for a case where the defendant's only defence is a counterclaim (*z*). Attempts have sometimes been made by plaintiffs in actions of debt or damages to get judgment as upon an admission of the statement of claim (*a*); and it is presumed that, as a counterclaim (in order to prevent such judgment from being signed) must, in addition to being substantial and not frivolous (*b*), be so connected with the claim as to be really in the nature of a set-off and defence to the action (*c*), it will not prevent it in the case of an action of ejectment. If the plaintiff has indorsed on his writ any of the claims which may without leave be joined with ejectment (*d*), he may enter judgment—final for a liquidated claim, interlocutory for damages—against a defendant in default (*e*). Damages in such a case are ascertained by the issue of a writ of inquiry, unless otherwise directed (*f*), or unless there are several defendants and all do not make default (*g*), in which case they are to be assessed at the time of the trial (*h*).

Setting aside judgment by default of pleading.—A judgment by default under any of the Rules of the Supreme Court may be set aside (*i*). The principles upon which the courts have acted when the default was in appearance (*k*) will, it is presumed, apply where it is made in delivering a defence.

(*t*) Under O. 32, r. 6.

(*u*) *Croft v. Collingwood*, W. N. 1884, p. 33.

(*x*) O. 27, r. 7.

(*y*) *Id.*, r. 9.

(*z*) It may be mentioned here that where ejectment is brought on a lease which is void, the lessee cannot found a counterclaim on any of the covenants (*e.g.*, for quiet enjoyment) which may be contained in it, for these fall with the lease: *Bangor (Bishop of) v. Parry*, [1891] 2 Q. B. 277.

(*a*) Under O. 32, r. 6, *supra*.

(*b*) See *Morsey Steamship Co. v. Shuttleworth*, 11 Q. B. Div. 531.

(*c*) See *Westacott v. Bevan*, [1891] 1 Q. B. 774, per Vaughan Williams, J.

(*d*) O. 18, r. 2; *supra*, p. 769.

(*e*) O. 27, r. 8.

(*f*) *Id.*, r. 4.

(*g*) As in *Gosset v. Campbell*, W. N. 1877, p. 134.

(*h*) O. 27, r. 5.

(*i*) O. 27, r. 15.

(*k*) *Supra*, p. 778.

Discovery and Inspection.—The rules as to discovery apply to actions of ejectment (*l*); but the Courts will deal strictly with applications to compel a person in possession to disclose his documents of title (*m*), especially if the applicant's case is ill-defined or speculative (*n*).

The right to discovery is not now in principle more extensive than it formerly was in the Courts of equity (*o*), *i.e.*, in cases where the bill was for some relief within their jurisdiction raising questions of title to land. But it is more extensive than it was under a bill for discovery in aid of a pending action at law, such as an action of ejectment (*p*); and the plaintiff in such an action is now entitled, in consequence of the fusion of the Courts under the Judicature Acts, to obtain discovery from a *bonâ fide* purchaser for value without notice, against whom the Courts of equity formerly refused to aid him (*q*). It follows also from the same principle that a plaintiff who claims double value, which is a penalty (*r*), is not entitled (in accordance with the former rule in equity) to discovery, either by interrogating the defendant (*s*), or by obtaining from him an affidavit of documents (*t*). Moreover, a plaintiff in ejectment must succeed (if at all) by the strength of his own title; and though discovery may always be obtained of matters tending to support his own case (*u*), discovery of matters relevant only to the defendant's title (*e.g.*, as to the documents upon which his claim is founded) (*x*) will not be permitted (*y*). But this does not apply where the discovery sought for is with regard to admissions as to the defendant's possession alleged to have been made by him (*z*), nor as it seems (where the Statute of Limitations is relied upon) to repel a defence founded upon that statute (*a*).

In considering the relevancy to the issues between the parties of documents or interrogatories (*b*), it must always be remembered

(*l*) *New British, &c., Investment Co. v. Peed*, 3 C. P. D. 196; *Wrentmore v. Hagley*, 46 L. T. 741.

(*m*) *Morris v. Edwards*, 23 Q. B. Div. at p. 290, per Lord Esher, M. R.; *affd.*, 15 App. Ca. 309.

(*n*) *Philippe v. Philippe*, 40 L. T. 815.

(*o*) *Lyell v. Kennedy*, 8 App. Ca. 217, per Lord Selborne, L. C. The decision in this case may be regarded as overruling *Dantel v. Ford*, 47 L. T. 575; *affd.* (O. A.), W. N. 1883, p. 27.

(*p*) See next-cited case.

(*q*) *Ind v. Emmerson*, 12 App. Ca. 300.

(*r*) *Ante*, p. 760.

(*s*) See *Hobbs v. Hudson*, 25 Q. B. Div. 232, cited *ante*, p. 566.

(*t*) See *Jones v. Jones*, 22 Q. B. Div. 425, cited *ante*, p. 571.

(*u*) *Cromwell v. Swail*, 1 T. L. R. 474, per Lord Coleridge, C. J.

(*x*) *Horton v. Donnington (Lord)*, 2 T. L. R. 739.

(*y*) *Lyell v. Kennedy*, 8 App. Ca. at p. 283, per Lord Selborne, L. C.

(*z*) *Id.*, 8 App. Ca. 217.

(*a*) *Id.*, 8 App. Ca. at p. 227, per Lord Selborne, L. C.

(*b*) See *Rogers v. Lambert*, 24 Q. B. D. 573.

that a tenant is estopped from disputing his lessor's title at the commencement of the tenancy, but not from alleging that it has expired or been assigned away (*c*); and that a defendant appearing by leave is not entitled to raise any issue not open to the tenant (*d*).

As regards the *practice* of discovery, it was not intended by the Rules of the Supreme Court to exclude all other methods of discovery (*e*). A mode of discovery, therefore, which prevailed at common law independently of repealed statutes may, if considered convenient, still be permitted (*f*). The methods now existing are as follows:—

- A. Inspection of documents referred to in pleadings or affidavits.
- B. Inspection of special documents as formerly at common law.
- C. Inspection of court rolls by a tenant.
- D. Obtaining an affidavit of documents from any other party.
- E. Inspection of documents scheduled thereto.
- F. Interrogatories.

A. *Documents referred to in pleadings or affidavits.*—Every party may give notice in writing (*g*) to any other party of his desire—and, in default of his compliance at the prescribed time and place (*h*), obtain an order (*i*)—to inspect and copy any document referred to in his pleadings or affidavits (*k*). Such notice may be given at any time, *e.g.*, by a defendant before delivering his defence (*l*); and no document of which inspection has after notice been refused may afterwards be put in evidence by the party refusing it (*m*), unless he satisfies the Court or judge that it relates only to his own title, he being a defendant, or that he, whether plaintiff or defendant, has some other sufficient cause or excuse for the refusal, in which case it may be allowed to be put in upon terms. An order will not be made under this rule to inspect privileged documents (*n*), nor in any case when the Court is of opinion that it is not necessary either “for disposing fairly” of the action or for saving costs (*o*).

(*c*) *Ante*, p. 469.

(*d*) *Supra*, p. 776.

(*e*) See *China Steamship Co. v. Commercial Assurance Co.*, 8 Q. B. Div. 142.

(*f*) See *Brown v. Liell*, 16 Q. B. D. 229.

(*g*) Form, App. B., No. 9.

(*h*) O. 31, r. 17.

(*i*) O. 31, r. 18 (R. S. C. 1893, r. 14).

(*k*) R. S. C. 1883, O. 31, r. 15.

(*l*) See *Quilter v. Heatly*, 23 Ch. Div. 42.

(*m*) O. 31, r. 15.

(*n*) See *Roberts v. Oppenheim*, 26 Ch. Div. 724; *Milbank v. Milbank*, [1900] 1 Ch. 376.

(*o*) O. 31, r. 18. See *Hope v. Brash*, [1897] 2 Q. B. 188.

B. *Inspection of special documents as at common law.*—From an early period the courts of common law exercised an equitable jurisdiction, independent of any statutory powers, to order inspection of a document forming the basis of an action where both parties had a common interest in it; and this jurisdiction still survives (*p*).

The practice was originally founded upon the doctrine that the party against whom an order was made held the document upon trust—express or implied—to produce it for the inspection of the other party (*q*); but long before the year 1852 it had been extended so as to include every case where the applicant had an interest in the document in equity and justice (*r*), it being held sufficient for him simply to depose that he had no copy of it (*s*). Such a trust was implied, sometimes from the mere fact of the document being *inter partes* without a counterpart (*t*), sometimes from special circumstances affecting a document not made between the parties to the suit (*u*).

A lessor has, in accordance with these principles, been allowed inspection of a lease (of which no counterpart was executed (*x*) or could be found (*y*)) in the hands of the lessee, and of a memorandum indorsed only on the lease and not on the counterpart (*z*); whilst a tenant in possession, whether holding immediately under the lease or not, has been permitted inspection of it in the hands of the lessor (*a*), and this without the latter being able to impose upon him any conditions (*b*). Even an assignee of the lease, though not a defendant, has been ordered to give inspection of it to a lessor (who brought ejectment for a forfeiture), if it proved to have been executed by both parties; for then “it carried on the face of it an implied trust on the part of the lessee to produce it at the request of the lessor” (*c*).

Applications for inspection should be made at chambers upon affidavits showing of what documents it is sought, that they are in the possession or power of the other party, and that the applicant

(*p*) See *Brown v. Liell*, 16 Q. B. D. 229.

(*q*) See *Batchliffe v. Bleasby*, 8 Bing. 148.

(*r*) See *Price v. Harrison*, 8 C. B. N. S. at p. 633, per Erle, C. J.

(*s*) *Id.*; *Doe v. Roe*, 1 M. & W. 207.

(*t*) See *Blogg v. Kent*, 6 Bing. 614.

F.

(*u*) See *Batesman v. Phillips*, 4 Taunt. 157.

(*x*) See *Blakey v. Porter*, 1 Taunt. 386; *King v. King*, 4 Taunt. 666.

(*y*) *Doe v. Slight*, 1 Dowl. 163.

(*z*) See *Mayor of Arundel v. Holmes*, 8 Dowl. 118.

(*a*) *Doe v. Roe*, 1 E. & B. 279.

(*b*) See *Read v. Coleman*, 2 Dowl. 354.

(*c*) *Doe v. Roe*, 1 M. & W. 207.

is entitled to inspect them (*d*). As in the last case (*e*), an order for inspection will not be made when and so far as the Court may think that it is not necessary either "for disposing fairly" of the action or for saving costs (*d*).

Applications under this head may be made by either party before pleading (*f*), and without giving security for costs (*g*), and may therefore often be resorted to in preference to an order for general discovery.

C. *Inspection of court rolls by a tenant*.—An order upon a lord of the manor to allow limited inspection of the court rolls may be made on the application of a copyhold tenant, supported by an affidavit that he has applied for and been refused inspection (*h*). A similar rule under the C. L. P. Act, 1852 (*i*), provided for the "usual limited inspection," and it may be presumed that the present rule is intended to continue to a copyholder his ancient rights of inspection (*k*). These were based on the ground that the lord is the "trustee and guardian of the evidence of the tenants' rights," in lieu of the latter being allowed the custody of their own muniments (*l*). A copyholder has therefore been allowed, where there was either a suit pending or a distinct controversy as to his estate (*l*), whether with the lord or another party (*m*), to inspect and take copies of such parts of the court rolls as related to his tenement, for the purpose of seeing how the admissions have gone on former occasions, what are the customs affecting it, and the privileges enjoyed with it (*n*). And the right has been extended to persons claiming under a copyhold tenant (who are therefore interested in the property (*o*)), to inspect for the purpose of completing their own title (*p*). In the case of a *freehold* tenant of a manor, inspection will only be allowed if some cause is depending in which his rights may be involved (*q*).

D. *The affidavit of documents*.—Any party may apply for an order for any other party to make an affidavit of documents (*r*),

(*d*) O. 31, r. 18 (R. S. C. 1893, r. 14).

(*e*) *Supra*, p. 784.

(*f*) See *Ratcliffe v. Bleasby*, and *Price v. Harrison*, *supra*.

(*g*) See *Brown v. Lidl*, 16 Q. B. D. 229. As to this in discovery generally, see p. 787, *infra*.

(*h*) R. S. C. 1883, O. 31, r. 19.

(*i*) Reg. Gen. Hil. T. 1853, r. 31.

(*k*) See *R. v. Shelley*, 3 T. R. 141.

(*l*) See *R. v. Tower*, 4 M. & S. 162.

(*m*) See *R. v. Lucas*, 10 East, 235.

(*n*) See *R. v. Merchant Tailors' Co.*, 2 B. & Ad. at p. 128, per Littleale, J.

(*o*) See *Ex parte Hutt*, 7 Dowl. 690.

(*p*) See *Ex parte Barnes*, 2 Dowl. N. S. 20.

(*q*) See *R. v. Allgood*, 7 T. R. 746; *Warrick v. Queen's College, Oxford*, L. R. 8 Eq. 683; *Owen v. Wynne*, 9 Ch. Div. 29.

(*r*) R. S. C. 1883, O. 31, r. 12 (amended by R. S. C. 1893, r. 13); *New British, etc., Investment Co. v. Peed*, 3 C. P. D. 196.

the object of which is to enable the Court to make an order for the production (s) of the documents mentioned in it, if it should think fit to do so (t). Hence an affidavit embodying a description of the documents which enables production if ordered to be enforced is sufficient (u). A deposit of 5*l.* (or of any less or greater sum, in the discretion of the Court) may first be ordered (x). The expression "any other party" includes plaintiff and co-plaintiffs, or defendant and co-defendants, when rights have to be adjusted between them respectively in the action (y). The Court has a discretion to refuse or limit such order, and it is not to be made when and so far as the Court is of opinion that it is not necessary either "for disposing fairly" of the action or for saving costs (z).

It has power to make it at any time (a), but the practice has been not to grant it, except under special circumstances, before the defence has been delivered (b). The affidavit must be in the prescribed form (c), and specify any documents which the party objects to produce (d), stating the grounds upon which privilege is claimed (e). It will be conclusive unless the Court, from the affidavit itself, or from the documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, is of opinion that it is insufficient (f). But the fact that privilege is thus claimed for certain documents will not prevent particulars of them from being ordered if they have been referred to in the party's pleadings (g).

The documents which must be scheduled are "those relating to the matters in question" in the suit. These words include not only such as would be evidence upon any issue, but also those which, it is reasonable to suppose, contain information which *may*—not which *must*—whether directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage that of his adversary (h).

(s) See p. 788, *infra*.

(t) See *Taylor v. Batten*, 4 Q. B. Div. 85.

(u) *Id.*; *Budden v. Wilkinson*, [1893] 2 Q. B. 432.

(x) R. S. C. 1883, O. 31, rr. 25, 26 (r. 6 of R. S. C. July, 1905). See *Newman v. L. & S. W. Ry. Co.*, 24 Q. B. D. 454.

(y) See *Shaw v. Smith*, 18 Q. B. Div. 193, per Lord Esher, M. R.

(z) R. S. C. 1883, O. 31, r. 12 (amended by R. S. C. 1893, r. 13).

(a) See *Union Bank of London v. Manby*, 13 Ch. Div. 239.

(b) See *Mellor v. Thompson*, 49 L. T. 222, per Bowen, L. J.

(c) App. B., No. 8.

(d) R. S. C. 1883, O. 31, r. 13.

(e) See *Gardner v. Irvin*, 4 Ex. Div. 49.

(f) See *Jones v. Monte Video Gas Co.*, 5 Q. B. Div. 556.

(g) *Milbank v. Milbank*, [1900] 1 Ch. 376.

(h) See *Compagnie Financière, &c. v. Peruvian Guano Co.*, 11 Q. B. Div. at p. 63, per Brett, L. J.

As a lessor's title to demise cannot be called in question by his tenant (*i*), it is submitted that a landlord is not bound to schedule his title deeds in the action now under discussion, except in so far as they may be pertinent to a defence open to the tenant (*k*), such as expiration of the lessor's title, or its devolution, where the action is by a successor in title.

No order, as already observed, will be made if "double value" be claimed (*l*). Nor will it be made at the instance of the plaintiff where the action is founded on a forfeiture (*m*).

The Court may now (*n*), on the application of any party at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are or has or have at any time been in his possession or power, and if not then in his possession when he parted with the same, and what has become thereof; such application being made on an affidavit stating that in the belief of the deponent the party against whom the application is made has or has at some time had in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the action or to some of them. But to entitle an application to be made under this rule, the party making it must file an affidavit of his belief as to the existence of *specific* documents, capable of being named and specified (*o*).

E. Inspection of the documents scheduled.—Production for inspection will in general be ordered (*p*) of all the documents scheduled by a party as in his possession or control, unless privilege on some valid ground is properly claimed in the affidavit (*q*), although it has been laid down that under the present practice it is no longer correct to say that the Court has no discretionary power otherwise (*r*). Any application to inspect documents not scheduled must be founded on an affidavit showing of what documents inspection is sought, that the applicant is entitled to inspect them,

(*i*) *Ante*, pp. 466 *et seq.*

(*k*) See p. 781, *supra*.

(*l*) See p. 783, *supra*.

(*m*) *Mezborough (Lord) v. Whitwood District Council*, [1897] 2 Q. B. 111, overruling *Seaward v. Dennington*, 44 W. R. 696.

(*n*) R. S. C. 1883, O. 31, r. 19A (R. S. C. 1893, r. 15).

(*o*) See *White v. Spafford*, [1901] 2 K. B. 241.

(*p*) R. S. C. 1883, O. 31, r. 14.

(*q*) See *Bustros v. White*, 1 Q. B. Div. 423.

(*r*) See *Hope v. Brash*, [1897] 2 Q. B. 188, per A. L. Smith and Rigby, L. JJ.

and that they are in the possession or power of the other party; and it will not succeed when and so far as the Court is of opinion that it is not necessary either "for disposing fairly" of the action or for saving costs (s).

The general doctrine of privilege is beyond the scope of the text: it will suffice to mention some decisions as to title deeds of special interest in actions of ejectment. The rule is that a plaintiff's documents of title are privileged if it is sworn that they relate solely to and contain nothing impeaching his title, and do not in any way tend to prove or support the title or case of the defendant (t). But the omission of the words "and contain nothing impeaching" will not in itself render his affidavit insufficient for the claim of privilege (u), whilst a defendant (original or by leave) may properly omit them (x). Such an affidavit will be conclusive, unless the Court is reasonably certain, from the description of the documents given by the party, or from other admissions and documents produced to the Court, that he has misconceived or misrepresented the nature of the documents (y). This rule, however, is now subject to the qualification that "it shall be lawful" for the Court to inspect any document for which privilege—on whatever ground (z)—is claimed, for the purpose of deciding as to the validity of such claim (a).

A party claiming privilege for documents of title may schedule them merely as numbered and tied up in a bundle identified in some way (b); and interrogatories as to its contents will not be permitted (c).

If the defendant is an assignee of the lease, the lessor will be entitled to inspect the assignment (d). And where the identity of parcels was in dispute, the plaintiff was allowed inspection of the maps and plans set out on the defendant's title deeds, on the ground that such identity was as much a part of title as devolution (e).

(s) R. S. C. 1883, O. 31, r. 18 (R. S. C. 1893, r. 14).

(t) See *Minet v. Morgan*, L. R. 8 Ch. 361. "To the best of my knowledge, information, and belief" is sufficient: *id.*

(u) See *Budden v. Wilkinson*, [1893] 2 Q. B. 432; *Johnson v. Whitaker*, 90 L. T. 535.

(x) *Morris v. Edwards*, 15 App. Ca. 309; *Att.-Gen. v. Newcastle Corporation*, [1899] 2 Q. B. 478.

(y) See *Att.-Gen. v. Emerson*, 10 Q. B. Div. 191.

(z) See *Ehrmann v. Ehrmann*, [1896] 2 Ch. 826.

(a) R. S. C. 1883, O. 31, r. 19A (R. S. C. 1893, r. 15). See *Williams v. Quebrada Ry. Co.*, [1895] 2 Ch. 751.

(b) *Morris v. Edwards*, *supra*; *Budden v. Wilkinson*, *supra*. See *Milbank v. Milbank*, [1900] 1 Ch. 376, per Lindley, M. R.

(c) *Morris v. Edwards*, *supra*; *Nicholl v. Wheeler*, 17 Q. B. Div. 101.

(d) *Doe v. Langford*, 21 L. J. Q. B. 217 (under the C. L. P. Act, 1852).

(e) *Brown v. Wales*, L. R. 15 Eq. 142.

A party may claim privilege in respect of muniments of title in the legal possession jointly of himself and a stranger to the action—*e.g.*, of the original lease of mortgaged premises, and the deeds of mortgage and transfer to himself and a joint mortgagee (*f*).

F. *Interrogatories*.—The practice is now regulated by the Order here treated of (*g*). Interrogatories in ejectment as in other actions can only be delivered by leave, and, as in the case of discovery of documents, a deposit of 5*l.* (or of any less or greater sum, in the discretion of the Court) may first be ordered. The particular interrogatories proposed to be delivered have now to be submitted to the Court on the application for leave, which is to be given as to such of them only as may be considered necessary either “for disposing fairly” of the action or for saving costs (*h*). The allowance, however, of the interrogatories does not amount to a decision that the party interrogated is bound to answer them, but leaves him at liberty to take any objection to them which would otherwise have been open to him (*i*). As in other actions, a party may be interrogated in ejectment as to the substance (as distinguished from the details) of material conversations, but not as to mere evidence by which material facts are to be proved (*k*).

A plaintiff is entitled, upon obtaining leave as already mentioned, to interrogate as to matters within the defendant's knowledge which tend to support his own case, even though he might have other means of proving the facts inquired after (*l*). But a lessor may not interrogate a lessee in order to establish a forfeiture (*m*); nor may a person in possession be interrogated as to the title by which he is in (*n*). (Where, however, in forfeiture by breach of covenant not to assign, interrogatories were put to the defendant to elicit proof of the assignment, a further answer, on his giving answers considered by the Court to be insufficient, seems *per incuriam* to have been ordered (*o*.) So a tenant holding over may not interrogate the person from whom he received possession in

(*f*) See *Kearsley v. Philips*, 10 Q. B. Div. 465.

(*g*) R. S. C. 1883, O. 31, rr. 1, 2 (R. S. C. 1893, rr. 11, 12); R. S. C. 1883, O. 31, rr. 3—11, 21—26 (r. 6 of R. S. C. July, 1905).

(*h*) O. 31, r. 2 (R. S. C. 1893, r. 12).

(*i*) See *Peek v. Ray*, [1894] 3 Ch. 282.

(*k*) *Eade v. Jacobs*, 3 Ex. Div. 335.

(*l*) *Lyell v. Kennedy*, 8 App. Ca. 217.

(*m*) *Mezborough (Lord) v. Whitwood District Council*, [1897] 2 Q. B. 111,

following *Pys v. Butterfield*, 5 B. & S. 829; *Blyth v. L'Estrange*, 3 F. & F. 154; *May v. Hawkins*, 11 Exch. 210, per Parke, B. In *Eade v. Jacobs*, *supra* (where interrogatories were allowed), this point does not seem to have been taken.

(*n*) *Horton v. Bott*, 2 H. & N. 249. See this point discussed *supra*, p. 783.

(*o*) *Richards v. Crawshaw*, 8 T. L. R. 446.

order to show that his title has expired (*p*). It has already been stated that if "double value" be claimed interrogatories will not be allowed (*q*), and that they will not be permitted as to the contents of documents of title for which privilege can be properly claimed (*r*). A defendant who pleads possession by himself or his tenants (*s*) may (subject to the leave above spoken of) be required to answer interrogatories demanding the names of such tenants and the dates of the commencement of their tenancies and their duration, but will not be compelled to give any further information as to their nature (*t*).

Production of documents on interlocutory proceedings.—Any person may be ordered at any stage of the proceedings to attend for the purpose of producing any documents which the Court or a judge may think fit to name in the order; but he may object to produce any document which he could not be compelled to produce at the hearing or trial (*u*). The effect of the order is equivalent to that of a *subpœna duces tecum*, and the person to whom it is directed must attend (*x*). The expression "any person" includes those who are not parties to the action; but the Court has no jurisdiction under this rule (*y*) to order an inspection—properly so called—of documents, its discretion being limited to ordering the production on some proceeding in the action of a document to the production of which the applicant is in justice entitled for the purposes of such proceeding (*z*). If made *ex parte*, the person affected by it may move to set the order aside (*a*).

Costs.—As in other cases, the costs of the action are in the discretion of the Court (*b*). But inasmuch as the provisions of the County Courts Act, which deal with the costs of actions brought in the High Court which might have been brought in the County Court (*c*), do not apply to actions of ejectment, it would appear that, except in special circumstances, costs would be recoverable on the High Court scale, even though sums of money by way of rent or mesne profits might be recovered at the same

(*p*) *Wallen v. Forrestt*, L. R. 7 Q. B. 239.

(*q*) *Supra*, p. 783.

(*r*) *Supra*, p. 789.

(*s*) *Supra*, p. 781.

(*t*) *Eyre v. Rodgers*, 40 W. R. 187.

(*u*) R. S. C. 1883, O. 37, r. 7.

(*x*) See *In re Smith*, [1891] 1 Ch. 323.

(*y*) O. 37, r. 7.

(*z*) See *Elder v. Carter*, 25 Q. B. Div. 194.

(*a*) See *In re Smith*, *supra*.

(*b*) O. 65, r. 1; 53 & 54 Vict. c. 44, s. 5.

(*c*) 51 & 52 Vict. c. 43, s. 116.

time as ancillary to the claim for possession, and the amounts would of themselves bring the matter within the provisions in question (*d*). It has been decided that if a plaintiff in ejectment claims several closes and the verdict is in his favour as to some only, the costs are to be taxed as upon findings on separate issues, although the defendant merely pleads the ordinary defence of possession as to all of them (*e*). Where the case is tried before a jury, such a claim therefore does not necessarily (*f*) constitute "good cause" (*g*) why the costs of the action should not follow the event (*h*).

Both before (*i*) and since (*k*) the C. L. P. Act, 1852, the Courts exercised a summary jurisdiction upon motion to compel the real defendant, although not a party to the record, to pay the costs of a successful plaintiff in ejectment; but while it was not necessary for this that he should have claimed an interest in the property (*k*), the mere fact that he had such interest, *e.g.*, that of an equitable mortgagee, was not sufficient unless it was clearly shown that the defence had been conducted by him for his own benefit (*l*). There appears to be nothing in the existing rules to curtail this jurisdiction.

Execution.—A judgment for the recovery of land may be enforced by a writ of possession in the same manner as a judgment in ejectment under the C. L. P. Act, 1852 (*m*). It will be noticed from the form of the writ (*n*) that the sheriff is directed therein to cause possession of the land to be given to the plaintiff; so that persons found in actual possession, though no parties to the proceedings, will be evicted under it (*o*). In order to sue out such a writ it is only necessary to file an affidavit of service of the judgment and of disobedience thereto (*p*). It will be issued against a tenant holding over although the title of the plaintiff (his lessor) has expired since the commencement of the action, unless the tenant can show that such a course would be futile and unjust, and that some one else and not the plaintiff has a right to the possession (*q*).

(*d*) *Calder v. Alexander*, cited in Ann. Pr., note to County Courts Act.

(*e*) *Jones v. Curling*, 13 Q. B. Div. 262.

(*f*) See *Huxley v. West London Ry. Co.*, 14 App. Ca. 26, per Lord Fitzgerald.

(*g*) Within O. 65, r. 1.

(*h*) *Jones v. Curling*, *supra*.

(*i*) *Thrustout v. Shenton*, 10 B. & C. 110; *Doe v. Gray*, *id.*, 615.

(*k*) *Hutchinson v. Greenwood*, 4 E. & B. 324.

(*l*) *Anstey v. Edwards*, 16 C. B. 212.

(*m*) O. 42, r. 5; O. 47, r. 1.

(*n*) See App. H., No. 8; and for forms of *præcipe* (to be filed under O. 42, r. 12), App. G., Nos. 7 and 7A.

(*o*) See *Geen v. Herring*, [1905] 1 K. B. at p. 156, per Mathew, L. J.

(*p*) O. 47, r. 2.

(*q*) *Knight v. Clarke*, 15 Q. B. Div. 294; *Buckland v. Gibbins*, 32 L. J. Ch. 391.

A successful plaintiff may at his election either have one writ or separate writs of execution for the recovery of possession and for costs (*r*).

Where lessors—the demised property being in the possession of a receiver appointed by the Court on behalf of a mortgagee of the lessees—obtained leave to issue against the lessees a writ for recovery of possession upon which judgment was afterwards obtained, it was held that such leave did not extend to the issue of a writ of possession, and the lessors were accordingly restrained from interfering with the possession of the receiver (*s*).

The costs of and incident to the issue of a writ of possession are, under the Judicature Act, 1890 (*t*), in the discretion of the Court, as being costs of a “proceeding” in it within that Act (*u*).

Div. IV.—EJECTMENT—(continued).

SECT. 2.—PROCEEDINGS IN THE COUNTY COURT.

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JURISDICTION.

By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 56 (*x*), these courts shall not have cognizance of any action of ejectment,

(*r*) O. 47, r. 3.

(*s*) *Morris v. Baker*, 73 L. J. Ch. 143.

(*t*) 53 & 54 Vict. c. 44, s. 5.

(*u*) *Dartford Brewery Co. v. Mosley*, [1906] 1 K. B. 462.

(*x*) Extended by 3 Edw. 7, c. 42, s. 3.

or in which the title to any corporeal or incorporeal hereditaments (*y*) shall be in question, except as provided in the Act. By sect. 59 (*z*), jurisdiction in actions of ejectment is given to the Court of the district in which the property in dispute is situate, when neither the annual value of the premises in dispute nor the rent payable in respect thereof exceeds 100*l*. The rent intended is that which is payable between the litigant parties (*a*); the annual value, on the other hand, is the actual marketable value of the property, and not of a litigant's interest in it (*b*). In estimating such value, therefore, a ground rent must not be deducted from the ordinary rent (*b*); whilst a rent payable by a third person to one of the parties is strong, though not conclusive, evidence of value (*c*).

Where the premises consist of different portions, and the annual value of the only portion the title to which is in dispute is clearly below the specified limit, the Court will have jurisdiction (*d*), unless the action is really brought to try the right to the whole (*e*). It seems doubtful, however, how far this could apply in ejectment as between landlord and tenant (*f*), where premises, though consisting of distinct portions, were comprised in a single demise.

If an action is commenced over which the Court has no jurisdiction, the judge must, unless the parties consent to the Court having jurisdiction, strike it out, and he may award costs against the plaintiff (*g*). Or the defendant may, before the trial (*h*), apply to a judge of the High Court at chambers (*i*) for a writ of prohibition (*k*); but if the judge decides against him (*l*) as to the value or rent, he will not be allowed to question such decision in the County Court (*m*). After a trial in the County Court, at which it is decided upon conflicting evidence as to an issue of fact that the

(*y*) This includes leaseholds: *Tomkins v. Jones*, 22 Q. B. Div. 599.

(*z*) Extended by 3 Edw. 7, c. 42, s. 3.

(*a*) *Brown v. Cocking*, L. R. 3 Q. B. 672.

(*b*) *Elston v. Rose*, L. R. 4 Q. B. 4. Both this and the last-cited case were decided under the corresponding section of the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 11, now repealed.

(*c*) *Brown v. Cocking*, *supra*.

(*d*) *Stolworthy v. Powell*, 55 L. J. Q. B. 228.

(*e*) *Rutherford v. Wilkie*, 41 L. T. 435.

(*f*) In both the last-cited cases the action was between adjoining owners. The decision in the former has been

doubted: *Bassano v. Bradley*, [1896] 1 Q. B. 645.

(*g*) 51 & 52 Vict. c. 43, s. 114. Or against the defendant: *Watson v. Petts*, [1899] 1 Q. B. 430.

(*h*) *Sewell v. Jones*, 1 L. M. & P. 525.

(*i*) 51 & 52 Vict. c. 43, s. 127. Or he may move in court for an order *nisi*, there being power, on special circumstances being shown, to make the order absolute *ex parte* in the first instance: Crown Office Rules, 1906, rr. 70, 71.

(*k*) See as to this generally, Ann. Ct. Prac., Part II., ch. 4.

(*l*) As to appeal, see *Watson v. Petts*, [1899] 1 Q. B. 54.

(*m*) *Symons v. Rees*, 1 Ex. D. 416.

case is within the jurisdiction, a prohibition will not be granted (*n*) except upon very strong grounds (*o*), unless the judge acted upon an erroneous conclusion of law (*o*). In such a case the writ may, it would seem, be granted even after possession has been delivered upon the judgment (*p*). And a defendant or his landlord may, within one month from the day of the service of the summons, apply to a judge of the High Court at chambers for a summons to the plaintiff to show cause why such action of ejectment should not be tried in the High Court, on the ground that the title to lands or hereditaments of greater annual value than 100*l.* would be affected by the decision in such action; and if on the hearing of the summons the action is ordered to be tried in the High Court, all proceedings in the County Court shall be discontinued (*q*).

A plaintiff who desires to question the decision of a judge to decline jurisdiction should apply (*r*) to the High Court for an order in lieu of mandamus, requiring the judge to hear and determine the action. The application is by motion for an order *nisi* (*s*).

The aggregate amount of any claims joined with ejectment (*t*) must not exceed 100*l.* (*u*). But the parties to *any* contemplated action, being one of those assigned to the King's Bench Division, may always, by agreement in writing (*x*), confer upon the judge of any County Court jurisdiction to try it therein (*y*).

The Conveyancing Act, 1881, s. 14, would seem to apply to County Courts, so as to prevent actions to enforce a right of re-entry for breach of covenant in leases from being brought, unless the steps pointed out in that section (*z*) have previously been taken. But jurisdiction to grant the relief already described (*z*) is only given by the statute to the High Court (*a*), so that a tenant seeking it should apply to the Chancery Division (*b*); though it seems probable that the jurisdiction in question, where actually invoked by the tenant "in the lessor's action" of ejectment in the County

(*n*) *Brown v. Cocking, supra*; *Fearon v. Norvall*, 5 D. & L. 439.

(*o*) *Elston v. Rose, supra*.

(*p*) *Jones v. Owen*, 5 D. & L. 669; where, however, the rule was obtained before such date.

(*q*) Sect. 59 (as extended by 8 Edw. 7, c. 42, s. 3). It seems clear that the proceedings in the High Court must be commenced by writ.

(*r*) Under sect. 131.

(*s*) Crown Office Rules, 1906, r. 69. In the vacation the application is to a

judge in chambers for a summons to show cause, when urgency must be proved.

(*t*) See pp. 805 *et seq.*, *infra*.

(*u*) Sect. 56 (as extended by 3 Edw. 7, c. 42, s. 3).

(*x*) Form No. 13 in App. to County Court Rules, 1903.

(*y*) Sect. 64.

(*z*) *Ante*, pp. 657 *et seq.*

(*a*) 44 & 45 Vict. c. 41, s. 2 (18).

(*b*) See sect. 69, sub-s. (1).

Court, is conferred on that tribunal by force of the Judicature Act (*e*).

In addition to their jurisdiction in actions of ejectment, County Courts have power in certain cases to order possession to be given to a landlord by special procedure (*d*). Under the original County Courts Act of 1846 (*e*), and that of 1856 (*f*), this was their only power in these matters, a limited jurisdiction in ejectment being given for the first time by the Act of 1867 (*g*). Their jurisdiction, however, was liable to be ousted in cases of disputed title; but the decisions on this subject and their bearing on the existing Act will be more conveniently considered when the special procedure itself has been explained (*h*).

PRACTICE.

The practice is governed by the Act of 1888 and the County Court Rules 1903, several of which are taken from rules (already discussed (*i*)) of the High Court. In cases not provided for, the general principles of the High Court practice may be followed (*k*).

Two forms of action are given, to be distinguished (*l*) as—(1) Recovery of land (called in the Act ejectment); (2) Recovery of possession (called in the Act recovery of tenements). It will be convenient to consider the latter form of action first, since the rule now referred to (*l*) gives it "preferential treatment," by enacting that where the former is resorted to in a case in which, in the opinion of the judge, the latter "should have been brought," the plaintiff shall not be entitled to any further relief or to any further costs than he would have been entitled to in that action (*m*).

A. *Action for the recovery of possession.*

This is confined to two cases:—

- (a) Where a tenant or sub-tenant is holding over (sect. 138).
- (b) Where one half-year's rent is in arrear (sect. 139).

The many points of difference between the two sections must be carefully noted.

(*e*) See 36 & 37 Vict. c. 66, ss. 89, 90; referred to *ante*, p. 15.

(*d*) This procedure is applicable, whatever may be the value or rent of the premises, in the case where, upon lettings of tenements to the working classes, default is made in compliance with a closing order: 3 Edw. 7, c. 39, s. 10.

(*e*) 9 & 10 Vict. c. 95.

(*f*) 19 & 20 Vict. c. 108.

(*g*) 30 & 31 Vict. c. 142.

(*h*) See *infra*, p. 800.

(*i*) *Ante*, pp. 765—793.

(*k*) 51 & 52 Vict. c. 43, s. 164.

(*l*) C. C. R., O. 5, r. 3.

(*m*) See *infra*, p. 806.

(a) In the case of holding over.—By sect. 138 (*n*), it is provided as follows: “When the term and interest of the tenant of any corporeal hereditament, where neither the value of the premises nor the rent payable in respect thereof (*o*) shall have exceeded 100*l.* by the year, and upon which no fine or premium shall have been duly paid, shall have expired, or shall have been determined either by the landlord or the tenant by notice to quit, and such tenant, or any person holding or claiming by, through, or under him, shall neglect or refuse to deliver up possession accordingly, the landlord may enter a plaint (*p*) at his option, either against such tenant or against such person so neglecting or refusing, in the Court of the district in which the premises lie for the recovery of the same, and thereupon a summons shall issue” (*q*). Against a tenant *only* (*r*), a landlord may add to such a plaint a claim for rent or mesne profits, or both, down to the day appointed for the hearing, or to any preceding day named in the plaint, so as such claim shall not exceed 100*l.* (*s*).

The words “shall have expired” were held, in a corresponding enactment now repealed (*t*), to apply only to cases of effluxion of time, and not to those of surrender (*u*), or of a forfeiture entitling the landlord to re-enter (*x*): nor to a case where, though a notice of his intention to quit had been given by a tenant and accepted by the landlord, the holding was under a lease which still subsisted (*y*).

A comparison of such enactment with similar provisions in the earlier County Courts Acts (*z*) makes it clear that the expression “notice to quit” in the section now in force includes any valid notice, although valid only by the express agreement of the parties. In the first enactment (*a*) a “regular” notice, in the others a “legal” notice, was required; and both terms were construed to exclude a notice invalid at common law, although valid by the agreement of the parties (*b*). It is doubtless in view of these decisions that the adjective has now been omitted.

(*n*) As extended by 3 Edw. 7, c. 42, s. 3.

(*o*) The construction of this expression will be the same as in sect. 59. See p. 794, *supra*.

(*p*) See s. 73.

(*q*) App. to C. C. R. 1903, Form No. 247.

(*r*) *Campbell v. Loader*, 3 H. & C. 520, per Channell, B.

(*s*) Sect. 138, *ad fin.*, as extended by 3 Edw. 7, c. 42, s. 3. Such claim is one for a “liquidated money demand” for

the purpose of entitling the plaintiff to a return of half the hearing fee where the defendant does not appear: *Treas. Order*, Dec. 30th, 1903, Sched. A, par. 12.

(*t*) 1 Geo. 4, c. 87, s. 1.

(*u*) *Doe v. Roe*, 2 B. & Ad. 922.

(*x*) *Doe v. Sharpley*, 15 M. & W. 558.

(*y*) *Doe v. Roe*, 1 D. & Ry. 540.

(*z*) 9 & 10 Vict. c. 95, s. 122; 19 & 20 Vict. c. 108, s. 50.

(*a*) 1 Geo. 4, c. 87, s. 1, *supra*.

(*b*) *Friend v. Shaw*, 20 Q. B. D. 374. Cf. p. 608, *ante*.

"Landlord" is in the Act defined to mean "the person entitled to the immediate reversion of the lands, or, if the property be holden in joint tenancy, coparcenary, or tenancy in common, any one of the persons entitled to such reversion" (c). But sect. 138 only contemplates cases where the ordinary relation of landlord and tenant has existed between the parties or their predecessors in title,—not such relation as that of a mortgagee to a mortgagor's tenant who has not attorned to him (d), or of an occupier who has agreed to purchase the premises by payment of instalments which are to be considered as rent until the whole price is paid (e). Where, however, the owner of premises let them to a person to whom he was indebted by a verbal agreement under which the interest on the debt was to be deducted from the rent, and afterwards assigned the reversion, it was held that the relationship sufficiently existed between the assignee and the tenant, and that the latter, after receiving a notice to quit, could not set up the verbal agreement as an answer to the plaintiff's title (f).

Service of the summons.—This is the same (g) as in the case of ordinary summonses (h). If the defendant cannot be found, and his place of dwelling is either unknown or admission thereto to serve him cannot be obtained, posting a copy of the summons on some conspicuous part of the premises claimed is to be deemed good service (g); and in the case of vacant possession the door of the dwelling-house (if any) may be resorted to for the purpose (i).

Notice to immediate landlord.—Any sub-tenant of the plaintiff's immediate tenant, if in occupation of the whole or part of the premises claimed, must forthwith give notice to his immediate landlord of any summons served upon him or coming to his knowledge, under penalty of forfeiting to such landlord three years' rack-rent, to be recovered, whatever its amount, in the Court issuing the summons (k). A warning to this effect is contained in the summons (l).

Right to appear and defend.—On the receipt of the notice (m) such landlord may, if not originally a defendant, be added or substituted as a defendant (k).

(c) 51 & 52 Vict. c. 43, s. 186.

(d) *Jones v. Owen*, 5 D. & L. 669.

(e) *Banks v. Rebbeck*, 2 L. M. & P. 452.

(f) *Jones v. Thomas*, 4 L. T. 210.

(g) Sect. 141.

(h) C. C. R., O. 7, rr. 9 *et seq.*; modified (with regard to actions under 3

Edw. 7, c. 42) by O. 22A, rr. 2 *et seq.* (C. C. R. 1904, rr. 20 *et seq.*).

(i) C. C. R., O. 7, r. 24.

(k) Sect. 140.

(l) See Form No. 247 in App. to C. C. R. 1903.

(m) See last paragraph.

Moreover, any person not named as a defendant in the summons may (*n*) by leave of the Court appear and defend, on filing, five clear days before the return-day, an affidavit (and as many copies as there are parties to the action) showing that he is in possession either by himself or his tenant, of the property claimed or some part thereof, mentioned in the particulars, to be described in such affidavit with reasonable certainty. The registrar will then add him as a defendant, giving three clear days' notice (*o*), with a copy of the affidavit, to each of the parties; and in subsequent proceedings such person will be named as a defendant (*n*).

Hearing of the summons.—Either party may claim a jury (*p*). An examination of the whole section seems to make it clear that the burden of proof on the plaintiff includes every point requisite to give the Court jurisdiction. He must therefore give evidence to prove:—

- (1) That the defendant before the entry of the plaint neglected or refused and still neglects or refuses to deliver up possession.
- (2) That neither the yearly value nor rent of the premises exceeds 100*l.*, and that no fine or premium has been paid.
- (3) "The holding," *i.e.*, the existence of the ordinary relationship of landlord and tenant between the parties, or if the defendant is not himself the tenant, that he holds or claims by, through, or under a tenant. Occupation subsequent to the creation of a tenancy and during its continuance is *primâ facie* evidence of holding under it.
- (4) The expiration of the tenancy, or its determination by notice to quit given either by the landlord or the tenant, with the time and manner thereof.
- (5) The plaintiff's title, if it has accrued since the letting of the premises, *i.e.*, his title to be considered landlord as against the defendant, whether by devolution from the lessor, or by attornment, or by estoppel otherwise (*q*).

(*n*) C. C. R. 1903, O. 10, r. 4. In actions under 3 Edw. 7, c. 42, for the words "five" and "three" in this rule the words "ten" and "eight" are to be respectively substituted: O. 22*A*, r. 11 (C. C. R. 1904, r. 29).

(*o*) See Form No. 254. The fee for

such notice is 2*s.* 6*d.*: Treas. Order, Dec. 30th, 1903, Sched. B, par. 18.

(*p*) C. C. R. 1903, O. 22, r. 3.

(*q*) The provision for the case where the plaintiff's title, though existing at the time the plaint is entered, has expired before the return-day is the

(6) The service of the summons, if the defendant does not appear. An indorsement under the hand of the bailiff on a copy of the summons is sufficient proof (*r*).

(7) The mesne profits, if claimed.

The defendant must then show "good cause to the contrary." As in the case of ejectment, he is now empowered, where he thinks fit, to "confess the action" by taking the steps for the purpose which will be presently pointed out (*s*). And he may also, five clear days before the return-day, file with the registrar a notice (together with a copy for the plaintiff) that his defence is limited to a part of the property claimed, describing that part in the notice with reasonable certainty; and the registrar will three clear days before the return-day send the copy of such notice to the plaintiff (*t*).

If the relationship of landlord and tenant is proved, the tenant is of course bound by any estoppel arising therefrom (*u*).

Under the Act of 1846, County Courts not only had no jurisdiction in ejectment, but were expressly prohibited from trying any action in which the title to any hereditament came in question (*x*). Their jurisdiction was consequently ousted in any action against an alleged tenant, if he *bonâ fide* set up a claim of title to the property in dispute, either in himself (*y*) or in some third person (*z*), or alleged that the plaintiff's title had expired since the letting (*a*); provided always that he were not estopped from raising his contention, and that the right set up by him was one which *could* exist in point of law (*b*). It was said (*c*), with regard to the above provision, that where there were special pleadings, and the question of title was raised upon them, the judge could go no further; but if the case were not raised on the pleadings, but merely suggested by the defendant, he must inquire into the circumstances before he could be satisfied that title did come in question. But he could only decide whether there was such a question; he could not enter at all upon its merits; and

same as in the case of ejectment: C. C. R. 1903, O. 23, r. 16; *infra*, p. 810.

(*r*) Sect. 78.

(*s*) C. C. R. 1903, O. 9, r. 7. See *infra*, p. 808.

(*t*) O. 10, r. 5. In actions under 3 Edw. 7, c. 42, for the above words "five" and "three" the words "ten" and "eight" are to be respectively substituted: O. 22A, r. 11 (O. C. R. 1904, r. 29).

(*u*) *Ante*, pp. 466 *et seq.*

(*x*) 9 & 10 Vict. c. 95, s. 58, in force until the year 1867, when it ceased to apply to hereditaments within the 20l. limit (30 & 31 Vict. c. 142, ss. 11, 12).

(*y*) *Kerkin v. Kerkin*, 3 E. & B. 399; *Pearson v. Glasebrook*, L. R. 3 Ex. 27.

(*z*) See *Emery v. Barnett*, 4 C. B. N. S. 423; *Marwood v. Waters*, 13 C. B. 820.

(*a*) *Mountnoy v. Collier*, 1 E. & B. 630.

(*b*) *Lloyd v. Jones*, 6 C. B. 81.

(*c*) *Lilley v. Harvey*, 5 D. & L. 648.

his decision was always open to review on an application for a prohibition (*d*), or an order in lieu of mandamus (*e*).

In the present Act, on the contrary, a general jurisdiction is expressly given in cases where the title to a hereditament comes in question (*f*), if neither the annual value nor rent of the property in dispute exceeds 100*l.* (*g*), while the jurisdiction conferred by sect. 138 has the further qualification, as has just been seen (*h*), that no fine or premium must have been paid.

The decisions under the Act of 1846 are therefore no longer of authority as to actions for possession any more than as to other actions (*i*), their *ratio decidendi* being the disability imposed by sect. 58 of that Act. There is nothing in the existing Act to restrict the language of sect. 138, which in terms specifies the plaintiff's title (if subsequent to the letting) and the holding as issues in the action to be proved by the plaintiff. It would appear therefore now to be the duty of the judge to hear and determine these actions in such cases. Of the difficulties which may at times arise, the facts of two of the cases referred to above may be taken as illustrations. In one, the defendant was heir-at-law of his lessor, from whom he rented part of his freehold estate; and upon his death disputed the validity of his will, under which the plaintiff claimed to be devisee of the tenement (*k*). In the other, the defendant alleged that his tenure was freehold at a quit rent (*l*). In either of these cases it would seem to be unjust to change the possession of the property as between the rival claimants to its ownership, by an order incompetent—as will be seen presently—to conclude any question of title. In cases of this description it is thought that the judge would be entitled to refuse to make an order, without deciding the question of title even for the purposes of the action, upon the ground that this section, as has already been seen (*m*), is only intended to apply to cases clearly between landlord and tenant.

(*d*) *Thompson v. Ingham*, 14 Q. B. 710. (This and other of the last-cited cases related to actions of rent or use and occupation, but the same principle applies.)

(*e*) *Emery v. Barnett*, *supra*.

(*f*) See on this point *Hawkins v. Rutter*, [1892] 1 Q. B. 668; *Howorth v. Sutcliffe*, [1895] 2 Q. B. 358; *Bassano v. Bradley*, [1896] 1 Q. B. 645.

(*g*) Sect. 60, as extended by 3 Edw. 7, c. 42, s. 3.

(*h*) *Supra*, p. 797. On the other hand,

F.

as will be seen *infra* (p. 802), sect. 139, like sect. 60, contains no such additional requirement.

(*i*) The following, in addition to those already given, may be referred to, though now possessing only an historical interest: *Chew v. Holroyd*, 8 Exch. 249; *Marsh v. Deves*, 17 Jur. 558; *Latham v. Spedding*, 17 Q. B. 440; *Lawford v. Partridge*, 1 H. & N. 621.

(*k*) *Kerkin v. Kerkin*, 3 E. & B. 399.

(*l*) *Pearson v. Glazebrook*, L. R. 3 Ex. 27.

(*m*) *Supra*, p. 798.

If at the trial it appears that an action for the same cause is pending in any other court of record, the judge will order the trial to stand adjourned to a certain day, and unless before that day the pending action is discontinued, the one in the County Court will be struck out (*n*). This rule applies generally to all actions.

If the defendant fail to show good cause, an order may be made that possession of the premises be given by the defendant to the plaintiff, either forthwith, or on or before such day as the judge may think fit to name, and judgment given for any rent, mesne profits, or costs to which the plaintiff is held entitled (*o*).

(b) **In the case of rent in arrear.**—By sect. 139 (*p*), “when the rent of any corporeal hereditament, where neither the value of the premises nor the rent payable in respect thereof (*q*) exceeds 100*l*. by the year (*r*), shall for one half-year be in arrear, and the landlord shall have right by law to re-enter for the non-payment thereof, he may, without any formal demand or re-entry, enter a plaint in the Court of the district in which the premises lie for their recovery, and thereupon a summons (*s*) shall issue to the tenant, the service whereof shall stand in lieu of a demand and re-entry; and if the tenant shall five clear days before the return-day of such summons pay into Court all the rent in arrear and the costs, the action shall cease” (*t*).

What has been said in treating of sect. 138 as to the meaning of the word “landlord,” the service of the summons, notice of it to the immediate landlord (*u*), the right to appear and defend, the power to “confess the action” and to limit the defence, and the right to a jury, applies equally to sect. 139.

Hearing of the summons.—In default of payment by the tenant, the landlord must prove in evidence—(1) the yearly value and rent; (2) that one half-year's rent was in arrear before the plaint was entered, and that no sufficient distress was then to be found

(*n*) C. C. R., O. 22, r. 11. Cf. *Bissell v. Williamson*, 7 H. & N. 391 (reported as *Williamson v. Bissell*, 31 L. J. Ex. 181).

(*o*) Sect. 138. See App. to C. C. R. 1903, Form No. 249.

(*p*) As extended by 3 Edw. 7, c. 42, s. 3.

(*q*) Cf. *supra*, p. 794.

(*r*) See note (*h*), *supra*.

(*s*) Form No. 248.

(*t*) A claim for recovery of possession under this section is to be deemed a claim for a “liquidated money demand” for the purpose of entitling the plaintiff to a return of half the hearing fee when the defendant does not appear: Treas. Order, Dec. 30th, 1903, Sched. A, par. 12.

(*u*) A warning as to the penalty incurred by not giving it (see p. 798, *supra*) is in this case also contained in the summons: see Form No. 248.

on the premises to countervail such arrear (*x*); (3) that the rent is still in arrear; (4) his right by law to re-enter for the non-payment of the one half-year's rent in arrear, *i.e.*, his right under the agreement of tenancy express or implied (*y*); (5) his title, if it has accrued since the letting of the premises (*z*); (6) the service of the summons (*a*) if the defendant does not appear.

Upon such proof, unless the tenant shows good cause (*b*) why the premises should not be recovered, a judge may order (*c*) possession to be given to the plaintiff by the defendant on any day he may think fit, not being less than four weeks from the day of hearing, unless within that period all the rent in arrear and the costs are paid into court. He has not, however, as it would seem, power (under this section) to give judgment for the rent in arrear, though a claim for such rent may no doubt be combined with a claim for recovery of possession under it (*d*).

Order under either section for recovery of possession.—(*a*) *How enforced.*—Such an order is, if not obeyed, enforced by the issue of a warrant of possession (*e*) at the instance of the plaintiff, requiring the court bailiff to give him possession of the premises named (*f*), and to levy upon the defendant's goods for the costs, and (if rent or mesne profits have been recovered by the plaintiff) for the amount of such judgment in addition (*g*). In this case—unlike that of ejectment (*h*)—the warrant may be issued by the registrar without evidence by affidavit of service of the order and disobedience thereto being required (*i*). That no order need be drawn up or served is also provided by the Act itself (*k*).

Warrants of possession are in force for three months from the day next after the last day named in the order for the delivery of

(*x*) See cases cited *ante*, pp. 672, 673, under C. L. P. Act, 1852, s. 210. But notice that under this Act (unlike the older Act) the distress sufficient to defeat the right of re-entry need not exceed the amount of a half-year's rent in any case.

(*y*) It seems clear that the expression "by law" in this section—unlike the same expression in sect. 33 of the Agricultural Holdings Act (*ante*, p. 608)—can have no other meaning than that given to it in the text. It is also used to the same effect in sect. 210 of the C. L. P. Act, 1852: *ante*, p. 671.

(*z*) The provision for the case where the plaintiff's title, though existing at the time the plaint is entered, has

expired before the return-day is the same as in the case (*infra*, p. 810) of ejectment: C. C. R. 1903, O. 23, r. 16.

(*a*) See p. 798, *supra*.

(*b*) The observations made *supra*, p. 801, as to questions of title under sect. 138, appear to apply equally to this section (sect. 139).

(*c*) Form No. 250.

(*d*) C. C. R. 1903, O. 4, r. 3.

(*e*) Form No. 251.

(*f*) Sects. 138, 139.

(*g*) *Supra*, p. 797. Under sect. 139, as just stated, the plaintiff cannot get judgment for the rent. (See Form No. 250.)

(*h*) *Infra*, p. 810.

(*i*) C. C. R. 1903, O. 25, r. 68.

(*k*) Sect. 143.

possession by the defendant (*l*). Entry by the bailiff must be made between the hours of 9 a.m. and 4 p.m. (*m*).

The warrant only extends to premises situate within the district of the Court out of which it issues (*n*).

(b) *Its legal effect*.—An order by the County Court for delivery of possession under the Act is by no means equivalent in its effect to a judgment in ejectment. The object of these sections is eviction,—to change the possession as between the parties to a tenancy—not to decide rights of property. Such an order contains no assertion of the plaintiff's title (*o*). It creates no estoppel as to the right to possession even against a party (*p*). If made under sect. 138, it is not even conclusive as to its own legality (*q*). If made under sect. 139, it is, as has been seen (*r*), in the first instance conditional. Where, however, it is not obeyed and a warrant of possession is issued and executed, it thereby puts an end to the tenancy, for the section provides that the plaintiff shall from the time of its execution hold the premises discharged of the tenancy, and that the defendant and all persons claiming by, through, or under him, so long as the order of the Court remains unreversed, shall be barred from all relief.

A tenant or sub-tenant, therefore, who has been evicted by proceedings under sect. 138, may, if he were not made a defendant,—and, it has been thought, even if he were—bring an action of trespass in the High Court against the landlord at whose instance the warrant was issued, and contest the validity of the County Court proceedings and the landlord's right in fact to evict him (*s*). *A fortiori* he may sue in ejectment (*t*). The Act, however, provides that if the landlord at the time of applying for the warrant had *lawful right to the possession of the premises*, or of the part thereof held over, neither he nor any one acting in his behalf shall be deemed a trespasser by reason merely of any irregularity or informality in the mode of proceeding to obtain possession under the Act (*u*). The only remedy of the party aggrieved is by action for any special damage sustained by him in consequence

(*l*) Sect. 143.

(*m*) Sect. 142.

(*n*) *Ellis v. Peachey*, 5 D. & L. 675.

(*o*) See Forms Nos. 249, 250; and cf. Forms (Nos. 257 *et seq.*) in ejectment.

(*p*) *Campbell v. Loader*, 3 H. & C. 520.

(*q*) See *Hodson* (or *Hudson*) *v. Walker*, *infra*.

(*r*) *Supra*, p. 803.

(*s*) *Hodson v. Walker*, L. R. 7 Ex. 55 (reported as *Hudson v. Walker*, 41 L. J. Ex. 51).

(*t*) *Id.* See per Martin, B.

(*u*) Sect. 145.

of such irregularity or informality (*v*). Such damage must be specially laid and proved as laid, and if assessed at no more than 5s., no more costs than damages shall be recovered, unless the judge who tries the case shall certify for full costs (*v*).

If the eviction was under sect. 139, a tenant or any one claiming by, through, or under him must by the provisions of that section obtain a reversal of the order before he can maintain any action.

Judges and other officers of the Court are protected from any liability for affixing the summons, or issuing or executing the warrant, by reason that the person suing out the same had not lawful right to possession of the premises (*x*).

Costs.—Costs are to be taxed, in the case of a plaintiff, on the scale (*y*) applicable to the rent or value of the premises upon which the court fees are assessed, plus the amount of any rent and mesne profits recovered; and in the case of a defendant on that applicable to the said rent or value, plus the amount of the rent and mesne profits claimed (*z*). The judge has power to certify that an action is of exceptional legal difficulty or importance, and to order taxation on a scale not otherwise applicable (*a*).

Appeal.—Either party may appeal upon any point of law or equity or the admission or rejection of evidence, as of right if both the yearly value and rent of the premises exceed 20*l.*; otherwise by leave of the judge of the County Court only (*b*). Nor is such leave the less necessary because the title to the premises is in question (*c*).

B. *Action for the recovery of land.*

The jurisdiction of County Courts under the Act has been already considered (*d*). A further restriction is imposed by the

(*v*) Sect. 145.

(*x*) Sect. 144. Cp. therewith sects. 52 and 55.

(*y*) As to scales, see App. to C. C. R. 1903 (Part IV.).

(*z*) C. C. R. 1903, O. 53, r. 13. As to poundage, see Treas. Order, Dec. 30th, 1903, Sched. A, para. 33, 34, 35.

(*a*) C. C. Act, s. 119; C. C. R., O. 53, rr. 7 (as amended by C. C. R. 1906, r. 13), 9. Further powers over costs, where title is in question, are given by O. 53, r. 8.

(*b*) Sect. 120. As to the procedure applicable, see R. S. C. 1883, O. 59; 57 & 58 Vict. c. 16, s. 1 (5).

(*c*) See *Shrewsbury (Lord) v. Garfield*, 60 L. J. Q. B. 765. This case seems

imperfectly reported (it not appearing clear whether the action was one for the recovery of tenements or one of ejectment), and is said to have been "overruled" by the C. A. in *Millet v. Ballard*, [1904] 2 K. B. 593 (see head-note). It is thought, however, that the statement in the text is still correct, and that the expression "an action in which the title to any corporeal or incorporeal hereditament shall have come in question" (in sect. 120), where an appeal lies as of right, refers to sect. 60, and does not apply to actions for the recovery of tenements, which are separately dealt with in the former section.

(*d*) *Supra*, pp. 793—796, and pp. 800—1.

rule already referred to (*e*), that where an action in the opinion of the judge "should have been brought" to recover possession under sects. 138 or 139, no further relief shall be given under sect. 59. This will sometimes place the landlord in a position of difficulty. If he brings ejectment in a County Court, he may have reason to anticipate an objection under the rule. If, on the other hand, he proceeds under sect. 138, he is liable, as has already been seen (*f*), to be harassed by subsequent litigation; if under sect. 139, there is a similar risk in the event of the order being reversed. In such cases it will often be best for a landlord, although his action is within the County Court jurisdiction, to sue in the High Court, especially if he has fair grounds for applying for summary judgment (*g*) under Order 14. Indeed, having regard to what has already been said on the subject of costs (*h*), it seems difficult to see the advantage of bringing an action of ejectment in the County Court at all.

The procedure being for the most part the same as in other actions, few matters require notice in the text.

Plaint and summons.—A plaint must be entered in the Court of the district in which the property lies, and a summons issued (*i*).

Joinder of causes of action.—The rule (*k*) as to what causes may be joined without leave is the same as that of the Supreme Court (*l*). A judge has a general power to order at any time separate trials of causes of action which have been joined but cannot conveniently be tried together (*m*).

Particulars.—These must contain a full description of the property claimed, and of its annual value and of the rent, if there be any fixed or paid in respect thereof (*n*). The costs of entering the plaint by a solicitor will be disallowed unless he signs the particulars in his own name or that of his firm, and states thereon

(*e*) C. C. R. 1903, O. 5, r. 3; *supra*, p. 796. The question does not appear yet to have been raised how far this rule may be *ultra vires*, by in a measure depriving the landlord of the right conferred upon him by sect. 59 of the statute in absolute terms. The authority of the rules is derived from sect. 164.

(*f*) *Supra*, p. 801.

(*g*) *Ante*, p. 780.

(*h*) *Ante*, p. 791.

(*i*) Form No. 252. A fee of 21s. is payable on entry: Treas. Order, Dec. 30th, 1903, Sched. B, par. 5.

(*k*) C. C. R., O. 4, r. 1.

(*l*) R. S. C. 1883, O. 18, r. 2; *ante*, p. 769.

(*m*) C. C. R., O. 4, r. 7.

(*n*) C. C. R., O. 6, r. 3.

his place of business and where he will accept service of proceedings on behalf of the plaintiff (*o*). A lithographed signature, though formerly held to be insufficient (*p*), will, it is submitted, now satisfy the above requirement (*q*). And signature in the name of the solicitor by a clerk authorized to sign will satisfy it also (*r*). If in the opinion of the Court the particulars are insufficient, the costs of entering the plaint by solicitor will not be allowed unless the Court otherwise orders (*r*).

Service.—The summons should (*s*), in order to insure its service, be delivered to the bailiff forty clear days at least before the return-day, and must be served thirty-five clear days before the return-day thereof (*t*).

In cases of vacant possession (*u*), if service cannot otherwise be effected, a copy of the summons may be posted upon the door of the dwelling-house, or other conspicuous part of the property (*x*). Substituted service, or notice in lieu of service, may in special cases be ordered (*y*).

Notice to landlord.—The defendant is warned by a notice on the summons (*z*) that he will be liable to the penalty under the C. L. P. Act, 1852, s. 209 (*a*), unless he, if only tenant of the property or some part thereof, forthwith give notice of the summons to his immediate landlord, or his bailiff or receiver. It would seem, however, to be contrary to principle to construe the section in question, which (though it has been said (*b*) to be remedial for the landlord, and therefore to be liberally construed) is penal towards the tenant, as if, after “writ in ejectment,” the words “or any process of an inferior court which may hereafter be substituted for such writ” had been inserted. Every prudent tenant will nevertheless obey these directions in the absence of any decision on the point.

(*o*) C. C. R., O. 6, r. 9.

(*p*) See *R. v. Couper*, 24 Q. B. Div. 583 (reported as *R. v. Croydon County Court (Deputy Judge of)*, 62 L. T. 583), diss. Lord Esher, M. R.

(*q*) 52 & 53 Vict. c. 63, ss. 20, 31.

(*r*) C. C. R., 1903, O. 6, r. 9.

(*s*) Substituted for “shall” in the corresponding rule of 1875, under which delivery within the time prescribed was obligatory: *Barker v. Palmer*, 8 Q. B. D. 9.

(*t*) C. C. R. 1903, O. 7, r. 8. As to proof of service, see p. 800, *supra*.

(*u*) As to which, see *ante*, p. 772.

(*x*) C. C. R., O. 7, r. 24. Cp. R. S. C. 1883, O. 9, r. 9.

(*y*) C. C. R., O. 7, r. 40. See Forms Nos. 43, 44, 45 in App.

(*z*) See Form No. 252.

(*a*) Set out *ante*, p. 773.

(*b*) *Crocker v. Fothergill*, 2 B. & A. 652.

Confession by defendant.—Any defendant in an action of ejectment may (*c*), at any time before the return-day, confess the action as to the whole or any part of the land, by signing, in the presence of any registrar or of a clerk to a registrar, or of a solicitor, an admission of the title of the plaintiff to the land, or to the said part thereof, and of his right to the possession thereof (*d*), which admission must be attested by the person in whose presence it is signed; and the registrar will, upon the receipt of such admission, forthwith give notice thereof by post to the plaintiff; and the Court may, on the return-day, upon proof of the signature of the defendant to such admission by affidavit or otherwise, in case the same is not attested by a registrar or his clerk, and without any further proof of the plaintiff's title (if no defendant other than the defendant signing such admission defends for the said land or the said part thereof), give judgment for the plaintiff for the recovery of possession and for costs (*e*). Provided that if the plaintiff receive notice of such admission before the return-day, he shall not be entitled, as against any defendant signing, to any costs incurred subsequently to the receipt of such notice, except the costs of attending the Court on the return-day, unless the Court shall otherwise order. Provided, also, that, where the admission is not signed by all the defendants defending for the said land, or the said part thereof, the trial shall proceed against all the defendants who shall not have signed as if no admission had been signed.

Appearance by persons not named in the summons.—Any person not named in the summons may (*f*), by leave of the Court, appear and defend, on filing, twelve (*g*) clear days before the return-day, an affidavit (and as many copies as there are parties to the action) showing that he is in possession, either by himself or his tenant, of the property claimed, or some part thereof, mentioned in the particulars, to be described in such affidavit with reasonable certainty. The registrar will then, upon leave being given, add him as a defendant, and give ten (*h*) clear days' notice (*i*), with a copy of the affidavit, to each of the parties. In subsequent proceedings such person will be named as a defendant.

(*c*) C. C. R., O. 9, r. 7. As to discontinuance by the plaintiff of the whole or part of his claim, see O. 9, r. 1: Form No. 253 in App.

(*d*) See Forms Nos. 256, 274.

(*e*) See Form No. 275.

(*f*) C. C. R., O. 10, r. 4.

(*g*) In actions under 3 Edw. 7, c. 42,

twenty: O. 22A, r. 11 (C. C. R. 1904, r. 29).

(*h*) In actions under 3 Edw. 7, c. 42, eighteen: O. 22A, r. 11 (C. C. R. 1904, r. 29).

(*i*) See Form No. 254. The fee for such notice is 2s. 6d.: Treas. Order, Dec. 30th, 1903, Sched. B, par. 18.

Defence.—Any defendant may, twelve (*j*) clear days before the return-day, file with the registrar a notice (together with a copy for the plaintiff) (*k*) that his defence is limited to a part of the property mentioned in the particulars, describing that part in the notice with reasonable certainty; and the registrar will, ten (*l*) days before the return-day, send such notice to the plaintiff (*m*).

As in other actions, notice of special defences or of any counterclaim, and a concise statement of their grounds, must be filed with the registrar five (*n*) clear days before the return-day (*o*).

The Statute of Limitations is a special defence (*p*), and the defendant is required to give notice, if he intends to rely on it, in accordance with the prescribed form (*q*).

When he relies upon any statutory defence, or any defence of which he is required by any statute to give notice, he must in his statement set forth (except in the case of the Statute of Limitations) the year, chapter and section of the statute, or the short title thereof, and the particular matter upon which he relies, or otherwise sufficiently indicate the nature of the defence (*r*).

If he wishes to set up any equitable estate or right, or seeks relief upon any equitable ground against the plaintiff's claim, or part of it, his statement must show concisely the circumstances which give rise to such defence, and each ground of equitable defence or counterclaim must be set out separately (*s*). If the requisite notice is not given, and the plaintiff refuses to permit the defence to be set up, the judge has a discretion at the trial to adjourn it upon terms (*t*). He may also at the trial order any counterclaim to be excluded upon or without any application for that purpose, if of opinion that it could be better disposed of by an independent action (*u*).

Discovery and inspection.—Discovery by interrogatories, and discovery and inspection of documents, are provided for by the County Court Rules, which follow closely the procedure prescribed by the Rules of the High Court already considered (*v*). The

(*j*) See note (*g*), *supra*.

(*k*) See Form No. 255.

(*l*) See note (*h*), *supra*.

(*m*) C. C. R., O. 10, r. 5.

(*n*) In actions under 3 Edw. 7, c. 42, ten: O. 22A, r. 13 (C. C. R. 1904, r. 31).

(*o*) C. C. R., O. 10, r. 10; Form No. 85; C. C. Act, 1888, s. 82.

(*p*) C. C. Act, s. 82.

(*q*) C. C. R., O. 10, r. 14; Form No. 85.

(*r*) C. C. R., O. 10, r. 18.

(*s*) *Id.*, r. 19.

(*t*) *Id.*, r. 10.

(*u*) C. C. R., O. 22, r. 20.

(*v*) C. C. R., O. 16. See *ante*, pp. 783—791.

Rules, however, contain no special provisions relating to actions for the recovery of land or of possession.

In any pending action or matter (*x*), an order upon the lord of the manor to allow limited inspection of the court rolls to a copyhold tenant may, as in the High Court (*y*), be made upon affidavit showing that he has applied for and been refused inspection (*z*).

Trial.—Either party may claim a jury (*a*). If it appears that an action for the same cause is pending in any other court of record, the rule is the same as in other actions (*b*).

Judgment.—Various forms of judgment in ejectment are contained in the Appendix to the Rules (*c*).

Where the plaintiff's title is shown to have existed as alleged in the summons at the time when the plaint was entered, but to have expired before the return-day, the plaintiff will be entitled to judgment according to the fact that he was so entitled, and for his costs of the action, unless the judge otherwise order (*d*).

Costs.—The judge may order the costs to be taxed under column A, B, or C (*e*), and in default of such order they are to be taxed under column B (*f*).

Execution.—A judgment for the recovery of land is enforced by a warrant of possession (*g*).

If no day is named in the judgment, it may issue after the expiration of fourteen clear days from the day on which judgment was given (*h*). Costs may either be included in the warrant or a separate warrant issued (*i*). A warrant of possession may not be issued without evidence by affidavit of service of the order and disobedience thereto (*k*).

(*x*) See these words defined in the C. C. Act, s. 186.

(*y*) See *ante*, p. 786.

(*z*) C. C. R., O. 16, r. 17.

(*a*) C. C. R., O. 22, r. 3.

(*b*) *Id.*, r. 11. See p. 802, *supra*.

(*c*) See Nos. 257 *et seq.*

(*d*) C. C. R., O. 23, r. 16. See Form No. 260.

(*e*) See App. to C. C. R. 1903 (Part IV.).

(*f*) C. C. R., O. 53, r. 11. See also C. C. Act, s. 119 (cited *supra*, p. 805); and C. C. R., O. 53, r. 8. A fee of 10s. 6d. is payable for taxation (Treas. Order, Dec. 30th, 1903, Sched. B, par. 7); and

a similar fee on an order for a new trial (*id.*, par. 6).

(*g*) C. C. R. 1903, O. 25, r. 64. See Forms Nos. 263, 264.

(*h*) O. 25, r. 65. (As to the poundage payable, see Treas. Order, Dec. 30th, 1903, Sched. A, par. 30.)

(*i*) *Id.*, r. 66. (As to execution for costs where judgment is given for the defendant, see r. 67.)

(*k*) *Id.*, r. 68. (A fee of 2s. 6d. is payable to the registrar for such affidavit: Treas. Order, Dec. 30th, 1903, Sched. B, par. 47.)

Appeal.—An appeal lies as of right upon any point of law or equity, or the admission or rejection of evidence (*l*).

DIV. IV.—EJECTMENT—(*continued*).

SECT. 3.—PROCEEDINGS BEFORE JUSTICES.

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Justices have power to put landlords into possession of small tenements—(A) in cases of holding over, (B) where they are deserted.

(A) *In cases of holding over.*

Jurisdiction.—The jurisdiction is given by the Small Tenements Recovery Act, 1838 (*m*). By sect. 1, where the term or interest of the tenant of any house, land or other corporeal hereditaments held by him at will or for any term not exceeding seven years, at a rent, if any, not exceeding 20*l.* per annum, and upon which no fine is reserved or made payable, has ended or has been duly determined by a legal notice to quit or otherwise, and such tenant, or (if he does not actually occupy the whole of the premises) the person by whom the same or any part thereof shall be then actually occupied, neglects or refuses to quit and deliver up possession of such premises or such part thereof, the landlord or his agent may cause the person so neglecting or refusing to be served with a written notice signed by such landlord or agent of his intention to

(*l*) C. C. Act, s. 120; *Millet v. Ballard*, [1904] 2 K. B. 593. As to the procedure applicable, see R. S. C. 1883, O. 59; 57 & 58 Vict. c. 16, s. 1 (5). *Op. supra* p. 805.
 (*m*) 1 & 2 Vict. c. 74.

proceed to recover possession under the Act (*n*). But nothing in the Act is to affect any rights to which any person may be entitled as outgoing tenant (*o*) by custom of the country or otherwise.

For the statute to apply, the relation of landlord and tenant must be clearly shown between the parties (*p*). Hence when the evidence of the party seeking to enforce it itself shows that such relation never existed, but that the other party obtained possession by a mere trespass, the justices have no jurisdiction under it (*q*). So where one person having taken premises from another had occupied them for twenty-five years without paying rent (*r*), it was held that the latter was not entitled to proceed under the statute, even though it were shown that he had executed repairs and paid all the taxes in respect of the premises (*s*). On the other hand, in order to exclude the statute it must be shown that the annual payments to be made (being in excess of the specified sum) are really made in respect of rent strictly so called and can be distrained for as such (*t*). Hence where a person agreed to occupy a portion of certain premises on condition of paying rates and taxes on the whole of them and keeping clean the portion he did not occupy, it was held that the Act was not excluded by reason of the annual payments he had to make being always in excess of the specified sum (*u*).

Interpretation of terms.—"Landlord" is the person entitled to the immediate reversion of the premises, or, if the property be held in joint tenancy, coparcenary, or tenancy in common, any one of the persons entitled to such reversion (*x*).

"Agent" is any person usually employed by the landlord in the letting of the premises or in the collection of the rents thereof, or specially authorized to act in the particular matter by writing under the hand of the landlord (*x*). The question whether a person is so employed as to be an agent of the landlord is, of course, one purely of fact (*y*).

"Person" includes a body politic, corporate, or collegiate (*x*).

"Notice to quit." The *legal notice to quit* required is a notice necessary at common law, apart from any stipulation between the

(*n*) The above section is not set out literally.

(*o*) See *ante*, pp. 716 *et seq.*

(*p*) See *R. v. Newent*, 9 J. P. 211.

(*q*) *Brown v. Newmarch*, 40 J. P. 212.

(*r*) See *ante*, pp. 677 *et seq.*

(*s*) *Webb v. Fordred*, 32 J. P. 804.

(*t*) *In re Richmond (Justices of)*, 10 T. L. R. 68.

(*u*) *Id.* The fact of the tenant being assessed on an annual value of 30*l.* was held to make no difference.

(*x*) Sect. 7.

(*y*) *R. v. Hopkins*, 64 J. P. 454.

parties, to determine the tenancy (z). The added words "or otherwise" would seem, however, to render the distinction immaterial, but to point only to a determination *ejusdem generis* with notice to quit (*e.g.*, under a power to "break" a lease at stated intervals (a)), and will not, it is thought, include determination upon a forfeiture (b).

Notice.—The notice must be in the statutory form (c), as follows:—"I [owner or agent (d) to , the owner, *as the case may be*] do hereby give you notice that unless peaceable possession of the tenement [*shortly describing it*] situate , which was held of me, *or of the said* [*as the case may be*] under a tenancy from year to year, *or* [*as the case may be*] which expired [*or 'was determined'*] by notice to quit from the said , *or otherwise* [*as the case may be*] on the day of and which tenement is now held over and detained from the said , be given to [the owner or agent] on or before the expiration of seven clear days from the service of this notice, I, , shall on next (e), the day of , at of the clock of the same day, at (f) , apply to His Majesty's justices of the peace acting for the district of [*being the district, division, or place in which the said tenement, or any part thereof, is situate*], in petty sessions assembled, to issue their warrant directing the constables of the said district to enter and take possession of the said tenement and to eject any person therefrom.

(Signed)

[Owner or Agent.]

Dated this

To Mr. C. D."

Service.—Service of this notice (g) may either be personal or by leaving it with some person being in and apparently residing at the place of abode of the persons holding over. The person serving

(z) See *Friend v. Shaw*, 20 Q. B. D. 374; cited *ante*, p. 797.

(a) *Ante*, p. 601.

(b) The wording of the Forms (Nos. 1 and 2, *infra*) in the schedule to the Act seems also to point to this conclusion.

(c) Contained in the schedule, Form No. 1.

(d) If the notice is given by the agent

he should describe himself as "agent to (the owner)": *Delaney v. Fox*, 1 C. B. N. S. 166.

(e) "Next" has been inserted by inadvertence, as seven clear days from service must have expired.

(f) The place should be specified: *Delaney v. Fox*, *supra*.

(g) Sect. 2.

it must read it over to the person upon whom it is served, or with whom it is left, and explain its purport and intent. If the person holding over cannot be found and his place of abode is either unknown or admission thereto for service cannot be obtained, the posting up of the notice on some conspicuous part of the property held over is to be deemed good service upon such person.

Complaint.—If possession is not given within seven clear days from the service, the landlord or agent may lay a complaint before two justices in the prescribed form (*h*), annexing a duplicate of the notice served on the person holding over. It will be heard on the day specified in the notice by two or more of the justices acting for the district, division, or place within which the premises or any part thereof are situate, in petty sessions assembled (*i*).

The prescribed form of complaint is as follows:—

"The complaint of [owner or agent, &c., as the case may be], made before us, two of His Majesty's justices of the peace, acting for the district of , in petty sessions assembled, who saith that the said did let to a tenement, consisting of , for , under the rent of , and that the said tenancy expired [or was determined by notice to quit given by the said , as the case may be] on the day of , and that on the day of , the said did serve on [the tenant overholding] a notice in writing of his intention to apply to recover possession of the said tenement (a duplicate of which notice is hereto annexed) by giving, &c. [describing the mode in which the service was effected]; and that notwithstanding the said notice the said refused [or neglected] to deliver up possession of the said tenement, and still detains the same.

(Signed)

Before us,

Taken the day of ."

(Signed)

Evidence.—If the tenant or occupier does not appear and show to the justices' satisfaction reasonable cause why possession should not be given under this Act, and still neglects or refuses to deliver up possession of the premises, or of the part thereof of which he is then in possession, to the landlord or his agent, such landlord or

(*h*) Sched. to Act, Form No. 2.

(*i*) A stipendiary magistrate may do alone any acts authorized to be done

by two justices: 21 & 22 Vict. c. 73, s. 1.

agent may give proof of the holding, and of the end or other determination of the tenancy, with the time or manner thereof; and, where the landlord's title has accrued since the letting, of the right by which he claims the possession, and also of the service of the notice, and the neglect or refusal of the tenant or occupier, as the case may be (*k*).

Warrant.—A warrant (*l*) will thereupon be issued to the constables and peace officers of the district, division, or place within which the premises or any part thereof are situate—and no other officer will be justified in executing it (*m*)—commanding them within a period to be named (but not less than twenty-one nor more than thirty clear days from the date of the warrant) to enter, by force if needful, upon the premises and give possession of them to the landlord or agent; provided that entry under such a warrant shall not be made on a Sunday, Good Friday, or Christmas Day, or at any time except between the hours of 9 A.M. and 4 P.M. (*n*). It has been held that the effect of the warrant is not to suspend the landlord's common law right of entry (*o*) until the period named in it has expired (*p*).

Much uncertainty seems to have arisen over that part of the above enactment which directs that the warrant when issued is to command the constable to enter on the premises "within a period therein named, not less than twenty-one, nor more than thirty, clear days from the date of such warrant" (*q*). The opinion has been expressed by the King's Bench Division—perhaps owing to the somewhat peculiar circumstances of the case the judgment hardly amounts to a binding decision—to the effect that justices cannot order the warrant to be executed earlier than twenty-one days from its date (*r*). It is, however, submitted that this is not the correct construction of the statute. The words, it will be noticed, are "within a period"; and, according to the ordinary meaning of the English language, they are by no means equivalent to the words "at a date." It is submitted that the true meaning of the enactment is that the warrant is, at the discretion of the justices, to specify a particular number of days (from twenty-one to thirty inclusive) from its date—for instance, twenty-five; and that

(*k*) 1 & 2 Vict. c. 74, s. 1.

(*l*) See Form No. 3 in sched. to Act.

(*m*) *Jones v. Chapman*, 14 M. & W. 124.

(*n*) Sect. 1.

(*o*) *Ante*, p. 763.

(*p*) *Jones v. Foley*, [1891] 1 Q. B. 780.

(*q*) See Stone's Justices' Manual, p. 630 (39th ed.).

(*r*) *R. v. Hopkins*, 64 J. P. 454. There is a *dictum* by Day, J., to the same effect in *Jones v. Foley*, *supra*.

in such case it may be executed "within"—i.e., *at any time within*—that number of days. If any confirmation of this view be required, it is supplied by the form of the warrant given in the schedule(s) of the statute itself, which prescribes the entry under it to be made "on any day within days from the date hereof." Nor is it easy to see why a tenant who is already in default in holding over, and who, as has been seen, has seven days allowed him between the service of the statutory notice and the hearing of the complaint, should, when the matter has been decided against him, have a further period of not less than three weeks before being called upon to give up possession (t).

Questions of title.—It appears never to have been decided whether a *bonâ fide* question of title ousts the jurisdiction given by this Act (u). It has, however, been held that where the person summoned had been proved to the satisfaction of the justices to be the tenant of premises, it was not competent to him to set up the title of a third person at the commencement of the tenancy against the person from whom he had received possession, and to whom he had paid rent (v). This is in accordance with the decisions under the early County Courts Acts, that a claim of title in order to oust jurisdiction must be one which the tenant was not estopped from asserting (x). The general rule as to the summary jurisdiction of justices is, that it is ousted if the party charged *bonâ fide* asserts title in himself to the land or the right over it in dispute (provided that there is some reasonable foundation for the claim), but not if the title set up is that of a third person (y). The justices must decide the question of *bona fides*, but if their decision is adverse, it may be reviewed upon *certiorari*, and will be set aside if the affidavits show that there was no reasonable evidence before them of a want of good faith (z). It is submitted that this rule applies to proceedings under the Act in question.

(s) See Form No. 3 in sched. to Act.

(t) That authorities as eminent as Jervis, C. J., Erle, J., and Martin, B., at all events, were of the opinion here contended for will appear clearly by referring to rule 200 of the C. C. R. 1851 (printed in 20 L. J. Rep. Com. Law): a rule—certified and approved by them, and thus acquiring statutory force under 12 & 13 Vict. c. 101, s. 12—which was founded upon an enactment (9 & 10 Vict. c. 95, s. 122, referred to in the margin of the rule) precisely

similar in its language to that of the statute here in question.

(u) In *Webb v. Fordred*, 32 J. P. 804 (cited *supra*, p. 812), it was merely held that there was no evidence that the parties were landlord and tenant.

(v) *Ross v. Davies*, 4 C. B. N. S. 56.

(x) *Emery v. Barnett*, *id.*, 423; *ante*, p. 800.

(y) See *Cornwell v. Sanders*, 3 B. & S. 206.

(z) See *R. v. Stimpson*, 4 B. & S. 301.

Costs.—It has been said that the justices have no power under the statute to award costs (*a*). Power to give costs, however, is conferred on justices by the Summary Jurisdiction Act (*b*) in all cases of summary conviction or of “orders” made by them on the one hand, and in cases where instead of convicting or making an order they “dismiss the information or complaint” on the other (*c*). And inasmuch as the direction for the issue of the warrant where the landlord is successful on the one hand would seem to be an “order” (*d*) within the Summary Jurisdiction Act (*e*), and a dismissal of the “complaint” must occur where the tenant is successful on the other (*f*), it seems possible that the case does fall within that Act, especially as justices exercising jurisdiction under the statute now in question (*g*) appear undoubtedly to be a court of summary jurisdiction (*h*). The chief difficulty (in addition to the point, already adverted to, that the warrant when issued is not issued to the defendant but to the constables) arises from the fact that the Summary Jurisdiction Act seems to contemplate only a procedure by summons: and though the notice is in one instance called a summons in the statute now under consideration itself (*i*), it is issued, as has been seen (*k*), not by the justices but by the landlord himself. The question it is believed has not yet received a judicial decision.

Remedies of parties aggrieved.—(*a*) *Order in lieu of mandamus.*—If the justices refuse to exercise their powers under the Act, the landlord or agent may apply, upon an affidavit setting out the facts, by motion in the King's Bench Division for an order *nisi* (*l*), requiring them to show cause why they should not be ordered to exercise them (*m*).

(*a*) *Stone's Justices' Manual*, p. 631 (39th ed.).

(*b*) 11 & 12 Vict. c. 43.

(*c*) Sect. 18.

(*d*) See *R. v. Bolton*, 1 Q. B. 66; *Ex parte Vaughan*, L. R. 2 Q. B. 114 (both decided under an Act of similar purport to 1 & 2 Vict. c. 74: *infra*, p. 820).

(*e*) See *Morant v. Taylor*, 1 Ex. D. 188.

(*f*) For the schedule (see Form No. 2) to the Act, though not the Act itself, requires a complaint to be made. See, too, per Wills, J., in *East London Waterworks Co. v. Charles*, [1894] 2 Q. B. 730.

(*g*) 1 & 2 Vict. c. 74.

(*h*) 52 & 53 Vict. c. 63, s. 13; *Boulter v. Kent Justices*, [1897] A. C. 556. See

per Lord Herschell at p. 571, and per Lord Davey at p. 573, of the report.

(*i*) 1 & 2 Vict. c. 74, s. 2.

(*k*) *Supra*, p. 813.

(*l*) Crown Office Rules, 1906, r. 69. See note (*s*), p. 795, *ante*.

(*m*) 11 & 12 Vict. c. 44, s. 5. See *R. v. Cotton*, 15 Q. B. at p. 574, per Coleridge, J.; *R. v. Biron*, 14 Q. B. D. 474, and note thereto, from which it would appear that in the case here contemplated the remedy by mandamus, though practically superseded by the above statute, might still be resorted to. See for a case of mandamus (before the above-cited statute), *R. v. Newent*, 9 J. P. 211.

(b) *Case stated*.—Either party, if dissatisfied with the determination of the justices as being erroneous *in point of law*, may apply to them to state a case pursuant to the Summary Jurisdiction Acts (*n*). It must be granted unless they think the application “merely frivolous” (*o*), and in case of refusal they may be ordered to state a case by the King’s Bench Division (*p*).

(c) *Certiorari*.—A writ of *certiorari* may be granted to remove the order (*q*) into the King’s Bench Division for the purpose of quashing it, if such Court is satisfied either that the justices had no jurisdiction to enter upon the inquiry (*r*), or that it was ousted (*s*), or that they had a personal interest in the matter (*t*). The justices cannot give themselves jurisdiction by an erroneous finding of fact, but, once their jurisdiction is founded, their decision upon conflicting evidence as to matters of fact involved in the inquiry, but not essential to found their jurisdiction, will not be overruled (*u*).

(d) *Action*.—The person on whose application and to whom a warrant is granted is not protected from an action in respect of an entry and taking possession thereunder, where he had not at the time of the granting of the warrant lawful right to the possession of the premises (*x*). If he had not such right, the obtaining of the warrant will be deemed a trespass by him, without any entry being made under it, against the tenant or occupier (*y*). And if such tenant or occupier elects to enter into a bond (*z*) with two sureties (approved by the justices) to the person obtaining the warrant to sue him with effect and without delay (*a*) for trespass, and to pay the costs of the action in the event of discontinuance, non-suit, or a verdict for the defendant, execution of the warrant will be delayed until judgment in the action has been given (*b*).

If the plaintiff succeeds, the warrant is superseded by the verdict and judgment, and he becomes entitled to a “full and reasonable

(n) 20 & 21 Vict. c. 43, s. 2; 42 & 43 Vict. c. 49, s. 33; *Brown v. Newmarch*, 40 J. P. 212.

(o) 20 & 21 Vict. c. 43, s. 4.

(p) Sect. 5.

(q) Cf. *supra*, at note (*d*).

(r) *R. v. Bolton*, *infra*.

(s) *R. v. Stimpson*, 4 B. & S. 301.

(t) See *R. v. Farrant*, 20 Q. B. D. 58, and cases there cited.

(u) *R. v. Bolton*, 1 Q. B. 66; *Ex parte Vaughan*, L. R. 2 Q. B. 114.

(x) 1 & 2 Vict. c. 74, s. 1; *Flitters v. Alfrey*, L. R. 10 C. P. 29.

(y) Sect. 3; *Darlington v. Pritchard*, 4 M. & Gr. 783.

(z) Every bond must be approved and signed by the justices, and is to be made at the costs of the landlord or agent: sect. 4.

(a) Cf. *ante*, p. 586.

(b) Sect. 3.

indemnity" for his costs of the action (c). In such an event the judge at the trial should be asked to indorse upon the record in court that the condition of the bond has been fulfilled (d). For cases where the landlord at the time of applying for the warrant had lawful right to possession, but some irregularity or informality has been committed in the proceedings for obtaining possession, the provision of this Act (e), under which the aggrieved party may bring an action for the damage alleged to be sustained thereby (f), is the same as that of the County Courts Act, 1888 (g). It appears never to have been decided whether a tenant evicted under this Act can bring ejectment, but there seems no reason to the contrary (h).

The justices by whom such a warrant is issued, and any constable or peace officer executing it, are protected from any action or prosecution by reason that the person to whom it was granted had not lawful right to the possession of the premises (i). It seems doubtful whether the protection extends to persons aiding the constable (k).

Extension of the Act.—The procedure under this Act has been extended by various statutes to the recovery of possession, by the Lords of the Admiralty (l), or the Secretary of State for War (m), of property vested in them; to recovery of possession by a valuer under the Inclosure Acts in cases of encroachment (n); and to cases of wrongful holding over by masters of grammar and charity schools (o), or by other similar recipients of the benefits of charities (p), by occupiers of allotments (q), or by occupying tenants of the working classes after the making of a closing order (r). Various special provisions as to jurisdiction and evidence will be found in these enactments, for which the statutes themselves must be consulted.

It may be here observed that a somewhat similar procedure for

(c) Sect. 3, as amended by 5 & 6 Vict. c. 97, s. 2. As it is the plaintiff and not the defendant who is thus entitled to a particular amount of costs, it is submitted that the case does not fall within 56 & 57 Vict. c. 61, s. 2: see *ante*, p. 571, note (z).

(d) Sect. 4.

(e) Sect. 6.

(f) *Delaney v. Foz*, 1 C. B. N. S. 166.

(g) Sect. 145; *ante*, p. 804.

(h) *Cole*, Ejec. 671.

(i) Sect. 5.

(k) *Edmunds v. Pinniger*, 7 Q. B. 558.

(l) 27 & 28 Vict. c. 57, s. 12.

(m) 22 Vict. c. 12, s. 5.

(n) 15 & 16 Vict. c. 79, s. 13; *Chilcote v. Youldon*, 3 E. & E. 7.

(o) 3 & 4 Vict. c. 77, s. 19; 4 & 5 Vict. c. 38, s. 18.

(p) 23 & 24 Vict. c. 136, s. 13.

(q) 8 & 9 Vict. c. 118, s. 111; 45 & 46 Vict. c. 80, s. 12. But in the case of allotments under the Act of 1887 (50 & 51 Vict. c. 48) there is no special reference to this Act: see s. 8, sub-s. (1).

(r) 3 Edw. 7, c. 39, s. 10. In this case it is expressly provided that the jurisdiction shall be irrespective of the value or rent of the premises.

the recovery of premises before justices was provided in certain special cases by enactments prior to the statute 1 & 2 Vict. c. 74 (s). The most important of these is the 59 Geo. 3, c. 12, under which parish officers are empowered, under certain conditions, to make leases of parish property (t). This Act applies both to the case where a person is permitted to occupy, or unlawfully intrudes upon, a parish *tenement or dwelling* (u)—a house for which rent is paid to the parish officers in the ordinary manner is not within this section (x),—and to that where a tenant refuses to deliver up possession of parish *lands* at the expiration of the term for which they may have been let to him, or of parish lands upon which he may have entered unlawfully (y). The effect of these provisions (z) is to entitle the parish officers a month after delivery to the occupier of a written and signed notice and demand for possession, to lodge a complaint with the justices of the district, who may thereupon issue a summons, and after the lapse of seven days proceed to a hearing, and by their warrant cause possession of the premises to be delivered to the parish officers. Personal service of such notice is not necessary, nor need it be served on the premises, as it is sufficient if it be made to appear that it actually reached the occupier (a). Nor is the statute intended to take away from the parish officers their common law right (b) to enter and take peaceable possession of the premises if they can, as in the case where they have been left unoccupied (c), for the legal possession remains in them (d). The order of the justices is not conclusive upon the tenant so as to prevent him from bringing ejectment where he has been dispossessed by it; and if he makes out a *prima facie* case by showing possession for a period exceeding that required by the Statute of Limitations, the parish officers must be able to displace it by proving affirmatively a good title (e).

The jurisdiction of the justices in these proceedings is not ousted by a claim of title, as the question of title is necessarily involved in the matter which the justices have to determine (f).

(s) *Eg.*, 2 & 3 Will. 4, c. 42 (recovery of cottage allotments), s. 6.

(t) See p. 54, *ante*.

(u) Sect. 24.

(x) *R. v. JJ. of Middlesex*, 7 Dowl. 767.

(y) Sect. 25.

(z) Which also apply to houses and lands vested in or under the control of the guardians of the poor of any union or parish: 5 & 6 Will. 4, c. 69, s. 5.

(a) *Appleton v. Morray*, 2 L. T. 516.

(b) *Ante*, p. 763.

(c) *Wildbor v. Rainforth*, 8 B. & C. 4.

(d) See *Fox v. Oakley*, Peake, Add. Ca. 214, where the principle seems to have been applied to a re-entry which (the premises not being unoccupied) could hardly be described as "peaceable."

(e) *Doe v. Hind*, 7 J. P. 290. The reference in the report seems to be to a wrong section of the statute.

(f) *Ex parte Vaughan*, L. R. 2 Q. B. 114; *R. v. Bolton*, 1 Q. B. 66.

(B) *Where the premises are deserted.*

Jurisdiction.—(1.) *Of Justices.*—By 11 Geo. 2, c. 19, s. 16, “if any tenant holding any lands, tenements, or hereditaments at a rack-rent, or where the rent reserved shall be full three-fourths of the yearly value of the demised premises, who shall be in arrear for one half-year’s rent (*g*) shall desert the demised premises and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, it shall and may be lawful to and for two or more justices of the peace of the county, riding, division, or place (having no interest in such premises (*h*)), at the request of the lessor or landlord, lessors or landlords, or his, her, or their bailiff or receiver, to go upon and view the same, and to affix or cause to be affixed upon the most notorious part of the premises notice in writing what day (at the distance of fourteen days (*i*) at least) they will return to take second view thereof; and, if upon such second view the tenant or some person on his or her behalf shall not appear and pay the rent in arrear, or there shall not be sufficient distress upon the premises, then the said justices may put the landlord or landlords, lessor or lessors, into the possession of the said demised premises, and the lease thereof to such tenants, as to any demise therein contained only, shall from thenceforward become void.” These provisions apply to tenants (at rack-rent, &c.) holding under any demise or agreement either written or verbal, and although no right or power of re-entry be reserved or given to the landlord in case of non-payment of rent (*k*).

(2.) *Of stipendiary magistrates.*—Every stipendiary magistrate may do alone the acts authorized to be done by two justices (*l*).

(3.) *Of the lord mayor and aldermen of the city of London.*—Within the city of London, the lord mayor, or any alderman for the time being of the city, sitting at the Mansion-house or Guildhall, may exercise the powers of two justices (*m*); but they have not the special powers, as to the matter now considered, conferred upon police magistrates within the metropolitan police district (*n*).

(*g*) Substituted for one year’s rent by 57 Geo. 3, c. 52.

(*h*) See *R. v. Farrant*, 20 Q. B. D. 58, and cases there cited.

(*i*) I.e., clear days: *Oreak v. JJ. of Brighton*, 1 F. & F. 110.

(*k*) 57 Geo. 3, c. 52.

(*l*) 21 & 22 Vict. c. 73, s. 1.

(*m*) 11 & 12 Vict. c. 43, s. 34.

(*n*) *Edwards v. Hodges*, 15 C. B. 477. See next paragraph.

(4.) *Of metropolitan police magistrates.*—A metropolitan police magistrate is exempted from the necessity of personally entering upon and viewing the premises. In every case within the metropolitan police district in which by the principal Acts (*o*) two justices are authorized to put the landlord or lessor into possession, a police magistrate may (*p*), upon the request of the lessor or landlord, or his bailiff or receiver, made in open court, and upon proof to his satisfaction of the arrear and desertion, issue his warrant to a constable of the metropolitan police to go upon and view the premises and affix the notices required by the above Acts; and upon the return of the warrant and proof to the satisfaction of the magistrate before whom it is returned of its due execution, and of the failure of the tenant, or anyone on his behalf, to appear and pay the rent in arrear, and that there is not sufficient distress upon the premises, he may issue his warrant to a constable to put the landlord or lessor into possession. Such constable must execute and return the warrant in the manner provided by the stat. 2 & 3 Vict. c. 47, and upon the execution of this second warrant the lease to the tenant, as to any demise therein contained only, shall thenceforth be void (*p*).

Evidence.—Justices have jurisdiction to act without any information upon oath, the statute only requiring a *request* by the lessor, landlord, bailiff, or receiver (*q*). It is their duty to view the premises upon a proper request by such person, and to determine upon that view whether the premises have been deserted by the tenant or not (*r*). They have also to inquire—but only in the best and most reasonable manner within their reach (*s*)—whether there is sufficient distress, and how far the rent reserved is a rack-rent or a full three-fourths of the yearly value (*t*); and it is at their discretion to take evidence, sworn or unsworn, as to these latter points (*t*).

(The statute, it will be noticed, does not state the time with regard to which such rent or value is to be computed; but it is thought that this does not necessarily refer to the date of the demise, and that a tenant may be said (in the words of the enactment) to be “holding” at the rent or value in question if that rent

(*o*) 11 Geo. 2, c. 19 (s. 16), and 57 Geo. 3, c. 52.

(*p*) 3 & 4 Vict. c. 84, s. 13. The section is not set out literally.

(*q*) See 11 & 12 Vict. c. 43, s. 10. The

usual course is to prefer a printed or written request.

(*r*) *Bastin v. Carew*, 3 B. & C. 649; *Ex parte Roberts*, 3 J. P. 290.

(*s*) *In re Emmett*, 14 J. P. 530.

(*t*) *Cole*, Ejec. 677.

or value prevails at the time the proceedings under it are commenced.)

In proceedings before a metropolitan police magistrate, on the other hand, proof to his satisfaction must be given both of the arrear and the desertion (*u*).

Premises are "deserted" for the purposes of these proceedings, if the justices, upon their *first* view, find that the tenant has deserted them, and left them uncultivated and unoccupied, so that no sufficient distress can be had to countervail the arrears of rent. The statute contemplates cases of a tenant "running away in arrear" (*x*). And a merely colourable possession is not enough. Thus, where the tenant of a house had for several months ceased to reside or carry on business there, and his furniture had been removed under a distress, and the justices, on their first view, found a person on the premises who, although alleged to be a servant of the tenant, was not a caretaker, and did not sleep there, they were held to be deserted (*y*). But where, although all the tenant's goods had been removed from the premises (a house and farm) under a distress, and the only furniture in the house consisted of a few chairs lent by a neighbour, the justices found the tenant's wife and children occupying the house, there was held to be no desertion (*z*).

It is not clear whether the words "sufficient distress to countervail the arrears of rent" include all the arrears alleged in the landlord's request to be due, or only one half-year's rent. In other similar enactments the words used are "arrears of rent *then due*," and these have been held to mean all arrears (*a*). The fact that the landlord has recovered judgment for half a year's rent, such judgment not being satisfied, will not prevent the statute from applying if the tenant desert the premises, leaving no sufficient distress (*b*).

It may be added that (as already stated (*c*)) if after a notice to quit has been given by the landlord the demised premises are deserted by the tenant *without any intention to return to them*, the landlord, as it has been held, is entitled, without having recourse to the statute at all, to resume possession whilst the notice is running, and even to break them open, if necessary (*d*).

(*u*) 3 & 4 Vict. c. 84, s. 13; *supra*, p. 822.

(*x*) Preamble to sect. 16 of 11 Geo. 2, c. 19.

(*y*) *Ex parte Pilton*, 1 B. & A. 369.

(*z*) *Ashcroft v. Bourne*, 3 B. & Ad. 684.

(*a*) See cases cited *ante*, p. 672, under C. L. P. Act, 1852, s. 210.

(*b*) *In re Emmett*, 14 J. P. 530; cf. *ante*, p. 557.

(*c*) *Ante*, p. 763.

(*d*) *Lacey v. Lear*, Peake, Add. Ca. 210.

Remedies of parties aggrieved.—(a) Order in lieu of mandamus.—Should the justices decline to enforce the Act, the landlord, as in the former case (*e*), may apply for an order to compel them to do so (*f*). Before justices, acting in obedience to the process of the Court, obtained protection (*f*) from actions being brought against them (*g*), the Court refused to make such order, even though it clearly appeared that the justices had acted incorrectly in declining to exercise their powers under the Act (*h*).

(*b*) *Appeal*.—It is provided by stat. 11 Geo. 2, c. 19 (*i*), that “such proceedings of the said justices shall be examinable in a summary way by the next justice or justices of assize of the respective counties in which such lands or premises lie, and if they lie in the City of London or County of Middlesex, by the judges” of the King’s Bench Division, “who are hereby respectively empowered to order restitution to be made to such tenant, together with his or her expenses and costs to be paid by the lessor or landlord, lessors or landlords, if they shall see cause for the same: and in case they shall affirm the act of the said justices, to award costs (*k*) not exceeding 5*l.* for the frivolous appeal.” This remedy is one open to the tenant only.

An appeal to justices of assize must be addressed to the judge or judges next going the circuit, individually, and not as commissioners of assize; for their authority to entertain it is derived, not from the commission, but from their office as judges (*l*). For the same reason an order signed and officially stamped by an officer of assize is no proof of an order made upon such an appeal, for such officer can only authenticate an act of the Court, which this is not; the signature of the judge or judges making it would seem to be required (*l*). An order for restitution ought to be directed to the justices who have turned the tenant out of possession; and where it was not directed to anyone the Court refused to grant a mandamus against them to enforce it (*m*).

(*e*) *Action*.—If the justices had jurisdiction to make their first entry and view, an action for trespass will not lie either against

(*e*) *Supra*, p. 817.

(*f*) Under 11 & 12 Vict. c. 44, s. 5. See *R. v. Biron*, 14 Q. B. D. 474, and cases there cited.

(*g*) *R. v. Cotton*, 15 Q. B. at p. 574, per Coleridge, J.

(*h*) *Ex parte Fulder*, 8 Dowl. 535.

(*i*) Sect. 17.

(*k*) For instances where such costs were awarded, see *Ex parte Roberts*, 3 J. P. 290; *In re Emmett*, 14 J. P. 530.

(*l*) *R. v. Sewell*, 8 Q. B. 161.

(*m*) *R. v. Traill*, 12 A. & E. 761. For the practice on appeal and forms, see Cole, Ejec. 679, 680.

them, or the constable assisting them, or the landlord put into possession upon their second view, even where upon appeal restitution is ordered (*n*). The record of their proceedings—which it is therefore important always carefully to draw up—will be a complete answer on behalf of all these persons (*o*). They have jurisdiction if the facts stated upon the request—whether truly or falsely—are sufficient in law to originate it (*p*). If a material statement in such request is false, the person making it is liable to an action for wrongfully procuring the justices to interfere (*q*). If the justices had not jurisdiction, they, as well as the landlord and constable, are liable to an action for trespass; nor would they seem to be protected (except now, so far as it goes, by the Public Authorities Protection Act (*r*)), until a successful appeal has been made, as in the case of acts done under a conviction, order, or warrant (*s*).

A tenant is precluded from bringing ejectment by the terms of sect. 16 (*t*), which declares the lease, “as to any demise therein contained only,” to be thenceforth void, if the justices have put the landlord into possession. For the same reason he continues liable for arrears of rent or any previous breaches of covenant; but his liability for subsequent breaches, although of covenants which by the lease are to be observed “during the term,” apparently ceases (*u*).

(*n*) *Ashcroft v. Bourne*, 3 B. & Ad. 684.

(*o*) *Basten v. Carew*, 3 B. & C. 649.

(*p*) *Id.*, per Abbott, C. J. Cf. *R. v. Bolton*, 1 Q. B. 66, cited *supra*, p. 818, at note (*u*); *Cole, Ejec.* 677, 678.

(*q*) *Basten v. Carew*, *supra*, per Bayley, J.

(*r*) 56 & 57 Vict. c. 61, s. 1.

(*s*) 11 & 12 Vict. c. 44, s. 2.

(*t*) Of 11 Geo. 2, c. 19; *supra*, p. 821.

(*u*) *Cole, Ejec.* 679.

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